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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF MARYLAND,

Petitioner,

v.

CRAIG W. MOON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

STEPHEN H. SACHS,
Attorney General of Maryland,

DEBORAH K. CHASANOW,
Assistant Attorney General,

7 N. Calvert Street,
4th Floor,
Baltimore, Maryland 21202,
Telephone (301) 576-6422,

Attorneys for Petitioner.

The Daily Record Co., Baltimore, MD 21202

QUESTION PRESENTED FOR REVIEW

Whether admission of the business records of University Hospital containing the results of blood alcohol and osmolality tests administered to Respondent violated his Sixth Amendment right to confrontation when the technician who performed the test was available to testify, but was not called by the State prior to introduction of the record?

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OPINIONS OF THE COURTS BELOW

The opinions of the Court of Appeals and Court of Special Appeals of Maryland are reproduced in the appendix hereto.

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals of Maryland was filed July 19, 1984. Jurisdiction of this Court is invoked

pursuant to 28 U.S.C. §1257(3) and Rules of the Supreme Court of the United States, Rule 17.1(b) and (c).

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Maryland Declaration of Rights, Article 21:

> "That in all criminal prosecutions, every man hath a right to be informed of the accusation against him; to have a copy of the Indictment, or charge, in due time (if required) to prepare for his defence; to be allowed counsel; to be confronted with the witnesses against him; to have process for his witnesses; to examine the witnesses for and against him on oath; and to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty."

STATUTES

Annotated Code of Maryland, Courts and Judicial Proceedings Article, §10-101:

> "(a) Definition of 'business'. - 'Business' includes business, profession, and occupation of every kind.
>
> (b) Admissibility. - A writing or record made in the regular course of business as a memorandum or record of an act, transaction, occurrence, or event is admissible to prove the act, transaction, occurrence, or event.
>
> (c) Time of making records. - The practice of the business must be to make such written records of its acts at the time they are done or within a reasonable time afterwards.
>
> (d) Lack of knowledge of maker. - The lack of personal knowledge of the maker of the written notice may be shown to affect the weight of the evidence but not its admissibility."

STATEMENT OF THE CASE

Craig Wesley Moon, Respondent, was convicted of automobile manslaughter and related charges arising out of an accident in Carroll County, Maryland on February 18, 1979, at approximately 12:30 a.m. Two people, the driver and passenger in a southbound car, were killed in a collision with a northbound car driven by Respondent.

Mr. James Martin was also traveling northbound just prior to the accident. At a point 3.5 miles from the scene of the accident he saw Respondent's Toyota approach his vehicle from the rear at a high rate of speed. In the rearview mirror he observed the Toyota drive onto the right shoulder of the highway once and onto the left shoulder twice. One and six-tenths miles from the accident scene Respondent passed Mr. Martin's car and proceeded at an estimated 45 to 50 miles per hour. There were no eyewitnesses to the collision and no evidence of Respondent's speed at the time of the collision. An accident reconstruction expert testified for the State that impact occurred in the southbound lane. A defense expert opined that the cars collided in the northbound lane. There was no skidmark evidence to indicate that the driver of either vehicle applied the brakes just prior to the accident.

Mr. Martin arrived at the scene within two minutes of the impact. He leaned into Respondent's Toyota and detected a strong odor of alcohol. A similar observation was made by the next person to arrive, Maryland State Trooper Jack L. Hinkle, who attempted to render assistance to Respondent. Twenty minutes later a Maryland State Police helicopter

reached the scene. Medical attendant Kenneth Degen also detected the odor of alcohol on Respondent's breath during the twenty-minute flight to the Shock Trauma Unit of University Hospital.

Over defense objection the trial court received into evidence hospital records showing the results of a blood osmolality test (State's Exhibit 4B) and a blood alcohol test (State's Exhibit 4A). The osmolality reading was 347 and the blood alcohol concentration was determined to be 0.165%. The parties stipulated that the records in Respondent's hospital file were kept in the ordinary course of business, so that the testimony of the custodian of the records was not a prerequisite to their admissibility. The stipulation did not extend to the admissibility of the test results that are the subject of this appeal. The defense objection was based in part on the contention that Respondent had a constitutional right to confront and cross-examine the laboratory technician, Dennis Seabolt, who obtained the results. The State had subpoenaed Mr. Seabolt as a witness and he was present in court for trial. Because the trial court ruled that the right of confrontation did not require his testimony and

that the documents at issue were admissible under the statutory business records exception to the hearsay rule, Code (1974, 1980 Repl. Vol.) §10-101, Courts and Judicial Proceedings Article, the State did not call Mr. Seabolt to testify.

Dr. Yale H. Caplan, Chief Toxicologist of the State Medical Examiner's Office, testified as an expert witness for the State. He indicated he had a general familiarity with the blood testing procedures used at the University of Maryland Hospital, but he did not know the specifics of the procedures used to obtain the results at issue. Over defense objection he interpreted these results at considerable length. An osmolality reading of 347 was consistent with, though not a definitive determination of, an alcohol concentration of 0.15 or 0.16%. He further testified that an individual with an alcohol level of 0.165% may experience heightened self-confidence, decreased concentration, impaired vision, and increased reaction time.

At the conclusion of the bench trial on October 30, 1979 before Judge Luke K. Burns, Respondent was found guilty on eight counts, two of automobile manslaughter, two

of homicide by motor vehicle while intoxicated, driving while intoxicated, reckless driving, negligent driving, and failing to drive on the right half of the roadway. He was sentenced to concurrent terms of three years imprisonment on the manslaughter charges and one year for driving while intoxicated. The remaining charges merged. The court suspended all but one year of the imprisonment and placed Respondent on three years' probation upon release.

On direct appeal, Moon raised several issues, including violation of the Confrontation Clause. The Court of Special Appeals reversed the convictions, finding a violation of Maryland's implied consent law and did not address Moon's remaining contentions. After granting the State's petition for writ of certiorari, the Court of Appeals, however, reinstated the convictions, concluding that the statute was inapplicable under the facts of this case. That Court remanded the case to the Court of Special Appeals for consideration of issues not previously decided, including whether admission of the blood alcohol and osmolality tests violated Respondent's constitutional right to confrontation. This time, the Court of Special Appeals affirmed; however, upon Moon's petition for

writ of certiorari, the Court of Appeals of Maryland reversed and remanded the case for a new trial on the basis of a violation of Moon's constitutional right of confrontation. (App. 1)

ARGUMENT

ADMISSION OF THE HOSPITAL RECORD OF TEST RESULTS DID NOT VIOLATE MOON'S RIGHT TO CONFRONT THE WITNESSES AGAINST HIM.

This case, as did Ohio v. Roberts, 448 U.S. 56, 62 (1980), presents an opportunity for the Court "to consider once again the relationship between the Confrontation Clause and the hearsay rule with its many exceptions." Here, the business records exception, one of the most trustworthy of the hearsay exceptions, was found by a majority of the Maryland Court of Appeals not to satisfy the constitutional requirements absent a showing of unavailability of the declarant. Rather, Petitioner submits that the documents in issue here, and business records generally, satisfy the necessity and reliability requirements of the Confrontation Clause.

The hospital records were conceded by Respondent, and accepted by the Court of Appeals, to be admissible under the Maryland business records statute:

> "§10-101. Written Record.
>
> (a) Definition of 'business'. - 'Business' includes business, profession, and occupation of every kind.
>
> (b) Admissibility. - A writing or record made in the regular course of business as a memorandum or record of an act, transaction, occurrence, or event is admissible to prove the act, transaction, occurrence, or event.
>
> (c) Time of making records. - The practice of the business must be to make such written records of its acts at the time they are done or within a reasonable time afterwards.
>
> (d) Lack of knowledge of maker. - The lack of personal knowledge of the maker of the written notice may be shown to affect the weight of the evidence but not its admissibility."

As with all such statutes, the rationale for this exception to the hearsay rule is that the records satisfy the tests of "necessity and circumstantial guaranty of trustworthiness." Morrow v. State, 190 Md. 559, 59 A.2d 325 (1948); Smith v. Jones, 236 Md. 305, 309, 203 A.2d 865 (1964); Burroughs

International Company v. Datronics Engineers, Inc., 254 Md. 327, 347-48, 255 A.2d 341 (1969).

Despite this obviously correct concession (the alcohol tests were a part of Respondent's hospital record made in the ordinary course of the hospital's business of treating injured patients), the Court of Appeals of Maryland held that admission of the record prior to the testimony of the individual who made the entries violated Respondent's rights to confront witnesses under the Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights.*

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* Mere mention of the Maryland constitutional provision does not constitute an adequate and independent state ground under Michigan v. Long, __ U.S. __, 103 S.Ct. 3469, 3476, 77 L.Ed.2d 1201, 1214 (1983):

> "[W]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so."

The opinion herein, filed more than a year after Long, fairly appears to rest primarily on federal law.

The majority opinion essentially held that:

> "Where the record of alcohol test results, on its face, gives rise to a question as to the reliability of the record and the tester is available and the defendant interposes a reasonable objection, testimony of the declarant is neither frivolous nor pointless. Rather, it is error not to require the declarant to testify before the record is admitted." ___ Md. at __, __ A.2d at __ (App. 26).

As pointed out by Judge Rodowsky in dissent, the majority opinion is legally incorrect and "needlessly brings into question the use in Maryland criminal cases of the most trustworthy exceptions to the hearsay rule." __ Md. at __, __ A.2d at __ (App. 32). He concludes:

> "As I see it, the fundamental error in the majority's rationale is the elevation of speculation above evidentiary fact and common experience. The majority uses the subjunctive mood to present its discussion of the untrustworthiness of Moon's University Hospital record. What Moon's counsel 'might' have asked is the sole concern. Under this analysis it is

> immaterial that the centuries of experience dating from adoption of the shop book rule make it most unlikely that the questions conjured by the majority would produce any answers evidencing a lack of trustworthiness in the hospital record. Thus, the standard for passing constitutional muster moves from the generally accepted reliability of the record to whether defense counsel 'might' want to ask some questions. Only such a Kafkaesque standard could convert the admission of reports on which life or death decisions are regularly based into a constitutional violation."(App. 51)

The majority's conclusion that the face of the record raised a question about its reliability and thereby violated the Confrontation Clause is both factually clearly erroneous and legally irrelevant to the question of admissibility. Any lack of clarity in the hospital record in this case went solely to its weight - a matter for the trial judge as factfinder.

Two documents are at issue. One, State's Exhibit 4A, the toxicology report, contained two dates: February 21, 1979 and February 18, 1979, 2:49 a.m. The current majority finds significance in this fact. The majority in the first Moon appeal dismissed it in a footnote, concluding that February 21st was the date when the results were written up and that

February 18th was when the tests were performed. (App. 68.) Furthermore, that document identified the Patient as "Male Doe 8515" and "65 54 44 049," but did not contain Moon's name. The other document, State's Exhibit 4B, the emergency room clinical laboratory report, contained the notations "M D 8515" and "65 54 44 049" as well as Moon's name. From these facts, the Court of Appeals' majority concluded that the reports were unreliable "on their face." If these observations suffice to render admission of an authenticated hospital record violative of the Confrontation Clause, then no hospital record is likely to pass muster in the eyes of the Maryland court.

Recently, In Ohio v. Roberts, supra, 448 U.S. at 65, n.7, the Court recognized that the rule of necessity aspect of the Confrontation Clause does not always require a showing of unavailability of the declarant, as when "the utility of trial confrontation is . . . remote . . . ." Furthermore, the business record exception was specifically mentioned as one of those which rest on "such solid foundations that admission of virtually any evidence within them comports with the

'substance of the constitutional protection.' Mattox v. United States, 156 U.S. [237], 244 [(1895)]." Ibid. at 66.

Its pedigree, even if not ancient, is nevertheless illustrious. Growing out of the common law "shopbook" custom of the 1600's, E. Cleary, McCormick on Evidence § 305 at pp. 717-18 (2d ed. 1972), the exception is now codified in statutes and rules of many jurisdictions. According to McCormick, both the common law and the codifications do not require any showing that the declarant is unavailable:

> "It appears, therefore, that under any statutory formulation or under present common law doctrines of admissibility the requirement of unavailability has for all practical purposes been abandoned. Apparent acceptance of inability to recall as satisfying the requirement, together with the common-sense recognition that in any of the situations likely to give rise to a business record the persons involved are unlikely to recall the details of specific transactions, means that proof that a record was made in the regular course of a routine activity constitutes a sufficient showing that calling the participants would be either unduly inconvenient or of no value." Ibid., § 311 at pp. 728-29.

Thus, the physical availability of the maker of an entry in a business record should be irrelevant to the admission of the record in evidence. The rationale for using business records in the first place is that the written record is probably more reliable than is the memory of its maker. The type of entry in question here certainly meets that description. The lab technician at a major metropolitan hospital cannot be expected to recall, months and years later, the specific results of tests run on blood and tissue samples of a particular accident victim. On the other hand, his contemporaneous recording of the results of those tests, upon which medical personnel made major treatment decisions, is highly trustworthy.

In like situations, other courts have properly evaluated the high reliability of business records and upheld their use as against confrontation clause objections. Again, Judge Rodowsky's dissent comprehensively sets out these authorities. (App. 38-43) In Howard v. United States, 473 A.2d 835 (D.C. App. 1984), written reports of the Drug Enforcement Agency were admitted under the applicable

District of Columbia business records statute. In finding no constitutional violation, the court considered their reliability:

> "[T]he reports contained objective facts rather than expressions of opinion. . . . [T]he chemists who conduct such analyses do so routinely and generally do not have an interest in the outcome of trials. In fact, as employees and scientists, they are under a duty to make accurate reports. It is difficult to perceive any motive or opportunity for the chemists to falsify." 473 A.2d at 839.

Here, the reports were not made by government chemists on items seized for criminal prosecution. Rather, a hospital technician performed routine tests for medical purposes. There is thus even less reason to fear a motive to falsify. Furthermore, the court in Howard noted that the defendant could challenge the reliability of the testing procedure or the qualifications of the chemist by subpoening the reporting chemist himself. So, too, Moon could have called the technician if the technician's current recollection could have shed any light on the import of the tests.

Similarly, in State v. Cosgrove, 181 Conn. 562, 436 A.2d 33 (Conn. 1980), the Supreme Court of Connecticut criticized judicial opinions which fail to accord routine

laboratory analyses the respect they are due and which needlessly burden trial process by requiring the State to produce the technicians. Particularly pertinent to the facts of this case, the Cosgrove court noted that the potential defense questions were not of the type that could only be asked on cross-examination of a State's witness:

> "We emphasize that both the questions raised by the district court and the Second Circuit panel in United States v. Oates, supra, [560 F.2d 45] could readily have been asked of the chemist if she had been the defendants' witness. While a defendant may be disadvantaged in certain contexts by the prosecutor's failure to call the extrajudicial declarant, see, e.g., Phillips v. Neil, 452 F.2d 337, 348 (6th Cir.); these disadvantages would seemingly be inconsequential in the present case because of the defendants' ability to call the chemist as their own witness. See, e.g., State v. Walker, 53 Ohio St.2d 192, 197, 374 N.E.2d 132. Moreover, it may well have been true that defendants' counsel, like Evans' counsel in Dutton v. Evans, supra, 400 U.S. 88 n. 19, 91 S.Ct. 219 n. 19, concluded that subpoenaing the extrajudicial declarant in this case would not have been in the best interest of their clients." (footnote omitted) 436 A.2d at 42.

The questions suggested concerned the chemist's personal qualifications and experience, whether the tests were correctly performed, the reliability of the tests, and the condition of the machines. Here, the questions suggested by the Court of Appeals go primarily to the type of test performed and the time of recording the results. Moon could just as well have elicited that information by calling Mr. Seabolt as his witness, as he could on cross-examination of a State's witness. It did not violate Mr. Moon's confrontation right to require that he, rather than the State, call the technician.

CONCLUSION

The Maryland Court of Appeals, in the guise of constitutional analysis, has eviscerated the business record exception for use in criminal trials. Its erroneous conclusion that, under the Sixth Amendment Confrontation Clause, a concededly authentic hospital record of objectively verifiable alcohol tests could not be admitted without first presenting an available technician is in conflict with decisions of this Court, other high state courts, and federal courts of appeals, and must be reversed. Petitioner prays that a writ of

certiorari issue to the Court of Appeals of Maryland to review the decision herein.

Respectfully submitted,

STEPHEN H. SACHS,
Attorney General of Maryland

DEBORAH K. CHASANOW,
Assistant Attorney General
7 N. Calvert Street
4th Floor
Baltimore, Maryland 21202
Telephone (301) 576-6422

Attorneys for Petitioner

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STEPHEN H. SACHS,
Attorney General of Maryland,

DEBORAH K. CHASANOW,
Assistant Attorney General,

7 N. Calvert Street,
4th Floor,
Baltimore, Maryland 21202,
Telephone (301) 576-6422,

Attorneys for Petitioner.

The Daily Record Co., Baltimore, MD 21202

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CRAIG W. MOON	*	IN THE
Appellant	*	COURT OF APPEALS
v.	*	OF MARYLAND
STATE OF MARYLAND	*	Sept. Term, 1982
Appellee	*	No. 87
	*	July 19, 1984

* * * * * * *

OPINION

Cole, J. delivered the opinion of the Court. Smith, Rodowsky and Menchine, J.J. dissent. Rodowsky, J. filed a dissenting opinion in which Smith and Menchine, J.J. concur.

Once again Craig Wesley Moon has petitioned this Court for relief. Moon's difficulties stem from his involvement in an automobile accident of February 18, 1979, on U.S. Route 140. Moon was travelling north when he collided with a vehicle in the southbound lane killing the driver and passenger of that vehicle. He was tried and convicted of two counts of automobile manslaughter, two counts of homicide by motor vehicle while intoxicated, reckless driving, driving while intoxicated, negligent driving and failing to drive on the right half of the road. The first time this matter came to our attention the State requested

our review of a per curiam opinion of the Court of Special Appeals reversing Moon's conviction because that Court determined that certain test results were received into evidence in violation of Md. Code (1974, 1980 Repl. Vol.) §§10-302 to 10-309, Courts and Judicial Proceedings Article. Moon v. State, No. 154, September Term, 1980, filed October 30, 1980. This Court reversed the Court of Special Appeals because we held that the blood taken from Moon and the chemical test performed thereon were done to determine treatment required rather than as evidence for criminal prosecution. We remanded this case to the court to consider the issues raised but not decided. State v. Moon, 291 Md. 463, 436 A.2d 420 (1981). On remand the Court of Special Appeals affirmed Moon's convictions. Moon v. State, No. 154, September Term, 1980, per curiam opinion filed February 10, 1982.

Thereafter this Court granted Moon's petition for certiorari and issued its per curiam order

> without affirmance or reversal, with instructions to answer the question "Were the results of Petitioner's blood alcohol and osmolality tests admitted into evidence in violation of his

> constitutional right of confrontation?" [Moon v. State, 293 Md. 593, 445 A.2d 703 (1982).]

On remand the Court of Special Appeals concluded that because of their objective nature, "the admission of Moon's blood alcohol and osmolality tests was not in violation of his constitutional right of confrontation." Moon v. State, No. 154, September Term, 1980, per curiam opinion filed June 23, 1982, at 1.

Moon filed a petition for writ of certiorari which we granted to consider the constitutional issue raised. Before us Moon contends that his right of confrontation and cross-examination was violated by admitting the hospital tests into evidence without presenting the testimony of the technician who performed the chemical tests. We shall recite such of the facts as are necessary to place the issue in proper focus.

The accident occurred on February 18, 1979, at approximately 12:30 a.m. Testimony at trial indicated that prior to the accident Moon's car was seen proceeding erratically at a high rate of speed. Persons arriving at the scene noted an odor of alcohol in Moon's car. The medical attendant accompanying Moon in a State Police helicopter to

the University of Maryland Shock Trauma Unit detected an odor of alcohol on Moon's breath. At the hospital the attending physician ordered x-ray examinations and drug screening tests to be performed. An osmolality test was performed in the clinicial laboratory of the Shock Trauma Unit and a blood alcohol test was performed in the hospital laboratory. The osmolality reading was 347 and the blood alcohol concentration was determined to be 0.165%. These test results were a part of and included in Moon's hospital records. The parties stipulated that the hospital records were kept in the ordinary course of the hospital's business and it was unnecessary to produce the custodian of the records to authenticate the file as pertaining to Moon. However, the stipulation did not extend to the admissibility of the osmolality and blood alcohol test results. The defense maintained that before the question of admissibility could be resolved it had the right to confront and cross-examine the laboratory technician who conducted the tests and obtained the results. The State argued that these tests were routine procedures followed by the hospital and were, therefore, admissible under the statutory business records exception to

the hearsay rule as provided in Maryland Code (1974, 1980 Repl. Vol.) §10-101, Courts and Judicial Proceedings Article. Thus, the State persisted that the defendant's right to confront the witnesses against him was outweighed by the inherent trustworthiness of the records and the fact that the laboratory technician was present and available in the courtroom at the time of trial was of no significance. The State, therefore, declined to call the technician. Because the defense was unwilling to vouch for the technician's credibility, it, too, refused to call him as a witness.

The trial court admitted the hospital records as business records under the statute, and the State called Dr. Yale H. Caplan, Chief Toxicologist of the State Medical Examiner's Officer, over objection, to interpret the results of the blood alcohol and osmolality tests. Dr. Caplan testified that he was generally familiar with the blood testing procedures used at University Hospital; that an osmolality test is an objective test conducted prior to treatment to indicate preliminarily if alcohol was involved in the condition of the patient; that the osmolality test is not a definitive test of alcohol but only an indicator; that a 347 osmolality reading

is consistent with a blood alcohol concentration of 0.15 or 0.16%; that the blood analysis is very definitive with a high degree of precision and accuracy; that a person with a blood alcohol level of 0.165% will experience heightened self-confidence, increased reaction time, decreased concentration and impaired vision.

In addition to objecting to Dr. Caplan's testimony, Moon claims he was denied the right to question the authenticity of these tests because the State did not produce the laboratory technician. Moon contends that the blood alcohol test report is saddled with several significant discrepancies. First, the report does not state his name but rather contains the description "Male Doe 8515" in the blank following the notation "patient." He admits that other documents in the hospital report specify his name and also contain the same number 8515. Moon further notes that the toxicology report indicates the time of blood withdrawal as "2-18-79 2:49 a.m."; however, the date of the report is indicated as "2-21-79." Moon argues that without the testimony of the technician, the trial court cannot be certain that the report is about him or why the blood test and/or

report was not made until three days after the test was allegedly conducted. He maintains that the timeliness of a report has direct bearing on its reliability. Thus, Moon squarely poses before us the question of whether admitting the hospital records into evidence without first producing the laboratory technician as a witness violated his constitutional right of confrontation.

The Sixth Amendment to the United States Constitution requires that: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." Article 21 of the Maryland Declaration of Rights requires that "in all criminal prosecutions, every man hath a right . . . to be confronted with the witnesses against himm. . . ." We note, therefore, that these provisions secure "the same right." Crawford v. State, 282 Md. 210, 211, 383 A.2d 1097 (1978) (citing State v. Collins, 265 Md. 70, 288 A.2d 163 (1972)). Furthermore, because the Sixth Amendment Confrontation Clause has been held applicable to the states, see Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965), the Supreme Court's interpretation of the federal right to confrontation is binding upon this State.

Nevertheless, because the Maryland right has been a part of our law since 1776, a brief review of both the major Maryland and Supreme Court cases interpreting the confrontation right where the hearsay rule has been involved is in order.

The first Maryland case in this area is Johns v. State, 55 Md. 350 (1881), in which the defendant was indicted as a defaulter under the Act of 1872, ch. 329, providing that the Comptroller's certificate showing the taxes due shall "be received as prima facie evidence of such defalcation." Id. at 359. Johnson contended that admitting the certificate violated his right to be confronted by the witnesses against him. The Court, however, rejected this argument, noting that this "provision of the Declaration of Rights is not to be understood as excluding all other evidence except oral evidence of witnesses produced in court." Id. at 360.

The Court of Appeals later discussed Johns in Jones v. State, 205 Md. 528, 109 A.2d 732 (1954). In that case, the defendant had been convicted of abortion. At trial, the prosecuting witness' testimony as to her pregnancy was uncertain; therefore, the State sought to prove pregnancy through the testimony of the head of the department of

obstetrics and gynecology at the hospital in which the victim had been treated after the "abortion." The doctor had never seen the victim; however, he had examined her hospital records and brought them to court. The defense objected to admitting the hospital records, without referring to the right of confrontation. Thereafter, the doctor testified about the substance of what was contained in the records without any reference to those records. The Court held that because the doctor gave the impression of testifying from personal knowledge as if he were her attending physician, permitting such testimony was erroneous.

Even though the hospital record was neither offered in evidence nor referred to in testimony and the defendant at trial had failed to raise any objection based on Article 21 of the Declaration of Rights, the Court indicated that the hospital record would have been admissible under the business records statute. The Court construed Johns as having "held that the right of confrontation does not apply to documentary evidence, and that the Legislature has the constitutional power to change the common law rules of evidence as to what documents are admissible and the weight to be attributed to

them, even in criminal cases." Id. at 533. This sweeping conclusion extended well beyond the facts with which the Court was faced in Jones. Subsequent cases have indicated that a more thorough analysis is required in a confrontation case than the sweeping deference to legislative alteration of evidence law suggested in Jones.

In 1965, the Supreme Court in Pointer v. Texas, supra, held that the Sixth Amendment right of confrontation is a fundamental right made obligatory on the states by the Fourteenth Amendment. In that case, Pointer and a co-defendant were taken before a judge for a preliminary hearing on a charge of robbery. The victim testified at this hearing, identifying Pointer as the robber; however, neither of the defendants was represented by counsel. The victim moved to California and at trial the transcript of his preliminary hearing testimony was introduced as evidence. Pointer was convicted and the Supreme Court reversed, holding that because the testimony was taken at a time when Pointer was not afforded through counsel an adequate opportunity to cross-examine the witness, he was denied his privilege of confrontation.

The Court in Pointer cited earlier cases dealing with the Confrontation Clause to illustrate the Court's understanding of this constitutional guarantee. For instance, in Mattox v. United States, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895), the Court offered one of its earliest interpretations of the Confrontation Clause:

> The primary object of the constitutional provision in question was to prevent depositions on ex parte affidavits such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief. There is doubtless reason for saying that the accused should never lose the benefit of any of these safeguards even by the death of the witness; and that, if notes of his testimony are permitted to be read, he is deprived of the advantage of that personal presence of the witness before the jury which the law has designed for his protection. But general rules of law of this kind, however bene-

> ficient in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case. To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot free simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent. The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused. [Id. at 242-43]

Thus, in Mattox where the witness had already given testimony under oath and had been cross-examined, his prior recorded testimony was admissible when he was unavailable at a subsequent trial.

On several occasions following Pointer the Supreme Court has further defined the confrontation right. In Douglas v. Alabama, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965), and Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), the Court found violations of the defendant's confrontation rights because of an inability to cross-examine an accomplice whose statement incriminating the defendant was presented to the jury. In Barber v. Page,

390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968), the Court recognized that the confrontation requirement is not violated when prior testimony that has been subject to cross-examination is utilized because the witness has become unavailable. However, in that case the Court noted that "a witness is not 'unavailable' for the purposes of the foregoing exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." Id. at 724-25. In Barber, the Court found that the witness was not "unavailable" because the State made no effort to procure the witness' presence.

In California v. Green, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970), the majority and a concurring opinion addressed the basic relationship between the hearsay rule and the right of confrontation. In that case the chief prosecution witness was present at trial yet became evasive; therefore, he was questioned regarding prior inconsistent statements that inculpated the defendant. California law allowed the substantive use of the statements to prove the truth of the matters asserted therein. The defendant was convicted and the California Supreme Court affirmed a lower court's

reversal, reasoning that substantive use of a prior inconsistent statement was precluded by the defendant's Sixth Amendment right to confrontation. The Supreme Court vacated this judgment concluding that this alteration of California's evidence law did not violate the defendant's constitutional rights.

The Supreme Court began its analysis by reviewing the relationship between the Confrontation Clause and the hearsay rule. The Court noted:

> While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception. See Barber v. Page, 390 U.S. 719 (1968); Pointer v. Texas, 380 U.S. 400 (1965). The converse is equally true; merely because evidence is admitted in violation of a long-established hearsay rule does

> not lead to the automatic conclusion that confrontation rights have been denied. [Id. at 155-56 (footnote omitted)][1]

The Court reasoned that because the literal right to "confront" witnesses formed "the core of the values furthered by the Confrontation Clause . . . there is good reason to conclude that the Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination." Id. at 157-58. The Court then evaluated the purposes of confrontation: (1) to insure that statements are given under oath; (2) to force the witness to submit to cross-examination; and (3) to permit the jury to observe the witness' demeanor. Id. at 158. Thus, the Court reasoned that even if an out-of-court statement is admitted, as a practical matter most of the benefits of these

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[1] The Court of Special Appeals also has recognized that the Confrontation Clause and hearsay rule are not synon[y]mous. In Gregory v. State, 40 Md. App. 297, 309, 391 A.2d 437 (1978), 1521
dge Wilner engaged in a thorough analysis of this problem and concluded: "The suggestion that the right of confrontation is no more than a particular expression or emanation of the hearsay rule does not find substantial support historially."

protections are regained when that declarant is present and testifying at trial. However, Justice Harlan's concurring opinion argued that the Confrontation Clause simply requires the prosecution to "produce any available witness whose declarations it seeks to use in a criminal trial." Id. at 174 (Harlan, J., concurring). See generally Note, Confrontation and the Hearsay Rule, 75 Yale L.J. 1434 (1966); Westen, The Future of Confrontation, 77 Mich. L. Rev. 1185 (1979).

In Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970), a plurality opinion, the defendant (Evans) was convicted of first-degree murder. At trial Shaw, an inmate of the same institution as Williams (an accomplice to the murders), testified that when Williams returned from his arraignment he lamented that if it hadn't been for Evans "we wouldn't be in this now." Shaw's testimony was admitted under the Georgia co-conspirator exception to the hearsay rule. The Court of Appeals for the Fifth Circuit reversed the District Court's denial of Evans' petition for writ of habeas corpus, concluding that he had been denied his Sixth Amendment right to confrontation. The Supreme Court reversed, but could not agree on the appropriate rationale.

The plurality opinion reaffirmed the Court's refusal to equate the Confrontation Clause and the hearsay rule. In concluding that admitting the statements did not deprive the defendant of his constitutional right, the plurality focused on two factors. First, it noted that the case did not involve evidence that was "crucial" or "devastating," because there were nineteen other prosecuting witnesses. Second, the plurality noted that the statement was offered to identify Evans and there were sufficient indicia of reliability in connection with the use of this statement in that it was spontaneous and against Williams' penal interest.

Justice Harlan concurred in the result, concluding that due process of law really is the appropriate standard for reviewing state rules of evidence. Harlan explained his departure from the position he took in California v. Green, supra, stating that certain types of evidence, notably business records, were so intrinsically reliable that requiring production of the declarant may be difficult, if not pointless.

Two Maryland cases followed Green and Dutton. In State v. Collins, 265 Md. 70, 288 A.2d 163 (1972), this Court concluded that the defendant's right to be confronted by his

accusers was violated by admitting an unavailable witness' deposition when the defendant received no notice of, and was not present at, the deposition. Judge Digges observed that traditionally there have been limited exceptions to the right to confront and cross-examine witnesses. "But these aberrations have only been permitted after close scrutiny has disclosed that this type of evidence is both necessary and so intrinsically reliable that it need not be subjected to the rigors of cross-examination." Id. at 78 (footnote omitted) (emphasis supplied).

In Crawford v. State, 282 Md. 210, 383 A.2d 1097 (1978), we concluded that the defendant's confrontation right was not violated by using testimony elicited at a preliminary hearing when the witness was unavailable for trial. In that case, the witness' demonstrated unavailability obviously made it necessary for the State to use her prior testimony. Thus, Chief Judge Murphy focused on whether the testimony at the prior judicial proceeding was sufficiently reliable. Citing the test elucidated by the Supreme Court in Mancusi v. Stubbs, 408 U.S. 204, 92 S.Ct. 2308, 33 L.Ed.2d 293 (1972), that there must be sufficient "indicia of reliability" associated with the

former testimony, the Court concluded that the testimony was basically reliable and thus admissible at trial.

Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), represents the most recent Supreme Court case in this area. Roberts had been arrested and charged with forgery and possession of stolen credit cards belonging to Bernard Isaacs and his wife. At a preliminary hearing, Roberts called the Isaacs' daughter, Anita, and tried to elicit an admission that she, in fact, had given him the checks and credit cards; however, she denied this. At trial, Anita did not appear although the State had issued several subpoenas to her at her parents' residence. Roberts testified that Anita had given him the cards and checks to use, and the State offered the transcript of Anita's testimony on rebuttal. The trial court conducted a voir dire hearing after Roberts asserted that use of the transcript violated his rights under the Confrontation Clause. Mrs. Isaacs testified that Anita had left home for Tuscon, Arizona, and later was in San Francisco. She had only talked with Anita twice and knew of no way to contact her. The trial court admitted the transcript and the Court of Appeals of Ohio reversed,

concluding that the State failed to show that it made a "good-faith effort" to secure Anita's presence. The Supreme Court of Ohio affirmed on other grounds, nonetheless holding the transcript inadmissible.

The Supreme Court noted that it was "called upon to consider once again the relationship between the Confrontation Clause and the hearsay rule with its many exceptions." Id. at 62. The Court acknowledged that it had proceeded gradually in this area, but suggested that "a general approach to the problem is discernible." Id. at 65. The Court stated:

> The Confrontation Clause operates in two separate ways to restrict the range of admissible hearsay. First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case (including cases were prior cross-examination has occurred), the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant. See Mancusi v. Stubbs, 408 U.S. 204 (1972); Barber v. Page, 390 U.S. 719 (1968). See also Motes v. United States, 178 U.S. 458 (1900); California v. Green, 399 U.S., at 161-162, 165, 167, n. 16.

The second aspect operates once a witness is shown to be unavailable. Reflecting its underlying purpose to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence, the Clause countenances only hearsay marked with such trustworthiness that "there is no material departure from the reason of the general rule." Snyder v. Massachusetts, 291 U.S., at 107.

* * *

The Court has applied this "indicia of reliability" requirement principally by concluding that certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the "substance of the constitutional protection." Mattox v. United States, 156 U.S., at 244.[8] This reflects the truism that "hearsay rules and the Confrontation Clause are generally designed to protect similar values," California v. Green, 399 U.S., at 155, and "stem from the same roots," Dutton v. Evans, 400 U.S. 74, 86 (1970). In also responds to the need for certainty in the workaday world of conducting criminal trials.

In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally

> requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.[9] [Id. at 65-66.]

In footnote 7, the Court indicated when "unavailability" might not be required. Citing Dutton v. Evans, supra, the Court suggested that if the utility of trial confrontation is "so remote" the prosecution would not be required to produce a seemingly available witness.

The Court then applied this analysis to the facts in Roberts. The reliability aspect of the test was satisfied because Roberts' attorney effectively cross-examined the witness at the preliminary hearing. Although she was called by the defense, the form of her examination was "replete with leading questions" and was the equivalent of significant cross-examination. Thus, the defendant was able to test the reliability of the testimony. Regarding availability, the Court held that the trial court of Ohio correctly concluded that the witness' unavailability had been established.

These cases make indelibly clear that the essence of the Confrontation Clause is to secure the right of the defendant to have the witness against him produced in court. An exception is noted when the witness is unavailable and has made an otherwise trustworthy out-of-court statement. In such circumstances, unavailability may be established when the State demonstrates a good-faith effort to produce the witness but to no avail.

The cases also suggest circumstances where the courts have found no confrontation violation because the evidence to be offered is clothed with substantial indicia of reliability. Such evidence is admitted without the declarant's testimony when producing the witness would likely prove unavailing or pointless. Business and hospital records fall within this category and generally the hearsay exception which allows their admission is expressed by statutory enactment.

The Maryland legislature has evidenced its approval of a business records exception to the hearsay rule in Md. Code (1974, 1984 Repl. Vol.) §10-101, Courts and Judicial Proceedings Article. However, as to he admissibility of records of alcohol test results in prosecutions for crimes

growing out of drunk driving, Maryland seems to have made a policy statement and expressed its deep concern with the preservation of a defendant's right of confrontation in prosecutions under the statute. The legislature made clear that alcohol test results are ordinarily reliable and generally admissible as business records. See Md. Code (1974, 1984 Repl. Vol.) §§10-302 to 10-309, Courts and Judicial Proceedings Article (generally dealing with procuring and using alcohol test results). Section 10-306 governs the admissibility of the test results and provides:

> (a) Subject to the provisions of subsection (b), in any criminal trial in which intoxication due to the consumption of alcohol, or being under the influence of alcohol, is an issue, an official copy of the results of a chemical test of breath or blood administered by a person authorized to administer the test, is admissible as substantive evidence without the presence or testimony of the technician who administered the test.
>
> (b) If the State decides to offer the test results without the testimony of the technician, it shall, at least 15 days before trial, notify the defendant or his attorney in writing of its intention and deliver to the defendant or his attorney a copy of the test results to be

> offered. If the defendant desires the technician to be present and testify at trial, he shall notify the court and the State in writing no later than 5 business days before trial; and if such timely and proper notice is given, the test results are inadmissible without the testimony of the technician. Failure to give timely and proper notice constitutes a waiver of the defendant's right to the presence and testimony of the technician."

It seems to us that §10-306(b) was designed to subordinate the admissibility of alcohol test results to the timely assertion of the defendant's right of confrontation. The statute requires the tester to be produced, upon the defendant's request, before the evidence may be admitted despite its reliability, and the defendant does not have to proffer what he intends to prove from this witness. In these circumstances, the legislature has safeguarded the defendant's Sixth Amendment right and elevated it over what the statute has declared to be reliable evidence. Moon, of course, contends that the stricture of 10-306(b) pertains to these proceedings since the charges he must answer emanate from drunk driving. However, we held in State v. Moon, 291 Md. 463, 436 A.2d 420 (1981), that §§10-302 to 10-309 did not

specifically apply to these proceedings where blood was taken from Moon as part of his treatment rather than for prosecution under the statute. We do not retreat from that position; nor is it necessary for us to go so far. Suffice it to say that we believe that where the record of alcohol test results, on its face, gives rise to a question as to the reliability of the record and the tester is available and the defendant interposes a seasonable objection, testimony of the declarant is neither frivolous nor pointless. Rather, it is error not to require the declarant to testify before the record is admitted. We believe that this holding secures to the defendant his right of confrontation and is consistent with the legislative policy which accords alcohol test results less deference than other business records.

Here, the witness was present in the courtroom when Moon objected, pointing to a number of discrepancies on the face of the report which raised a doubt as to its reliability. Moon claimed that the hospital records were silent as to the kind of blood alcohol test performed. Dr. Caplan had indicated that while he was generally familiar with the tests employed at University Hospital, he did not know which

specific procedure of the many tests used in the hospital was followed. As a matter of fact, when defense counsel sought to have the Doctor explain how a blood test was performed, the trial court cut off the cross-examination in response to the State's objection. It is obvious to us that, under these circumstances, defense counsel had a sound basis for inquiring what test was used and if the technician was qualified to conduct the test.

Furthermore, the report indicated that it was completed on February 21, and the blood was drawn from the patient on February 18. These facts raise several potentially serious questions counsel may have addressed on cross-examination. Defense counsel in argument had told the trial court that the test was performed on the 21st and the blood drawn on the 18th. He did not know what happened to the blood sample in the interim, that is, how or if it was properly preserved. Cross-examination on whether chemical agents were added to the blood to maintain its stability, if the blood was deposited in a container to avoid evaporation, and if the blood was properly refrigerated to prevent putrefaction was germane to a determination of reliability. See generally

American Medical Association, Committee on Medicolegal Problems, Alcohol and the Impaired Driver, A Manual on the Medicolegal Aspects of Chemicl Tests for Intoxication (1968). A most important question was whether the blood test was performed on the 21st as part of Moon's treatment. Moon had been in the hospital three days, been operated on and placed in casts for his injuries prior to February 21st. It would be logical for counsel to inquire how blood drawn on the 18th and tested on the 21st had any diagnostic value for treatment already received. If counsel elicited from the technician that the test was conducted on the 21st in response to a police request, the trial judge may have concluded that the test was not performed in connection with Moon's treatment and, therefore, was not pathologically germane to the reason Moon was in the hospital. See Yellow Cab Co. v. Hicks, 224 Md. 563, 168 A.2d 501 (1961); Shirks Motor Express v. Oxenham, 204 Md. 626, 106 A.2d 46 (1954); Lee v. Housing Authority of Baltimore, 203 Md. 453, 101 A.2d 834 (1954); Globe Indemnity Co. v. Reinhart, 152 Md. 439, 137 A. 43 (1927). Counsel may even have inquired as to how the test, even if performed on the 18th, was pathologically

germane to Moon's treatment if it were not transmitted to the doctors until the 21st. Under these circumstances, the trial court may have been persuaded that the test was inadmissible.

Moon also complained that the report did not bear his name but rather a number. We do not speculate as to what Moon's counsel would seek to prove by cross-examining the witness on this point. We do take note that trial counsel is often resourceful and ingenious in making use of the right of cross-examination. Suffice it to say here that the areas we single out are important enough to indicate that cross-examination would not have been frivolous or pointless.

While we recognize that ordinarily hospital (business) records are regarded as reliable, here, because Moon was denied the right to be confronted with the technician, it is questionable whether the report was properly admitted under the business records statute. Section 10-101(c) of the Courts Article requires that business records be made "at the time they are done or within a reasonable time afterwards." [Emphasis supplied] No testimony was presented at trial regarding standard hospital procedure and there was no

explanation for the three-day delay if it is assumed the test was made on the 18th. Timeliness in preparing a business record is logically related to the reliability of the record itself. Here, we can make no accurate assessment of the document's reliability because the means of testing its trustworthiness were withheld from the defendant.

In short, we conclude that although §10-306 of the Courts Article has no application to the facts in this case, the policy set forth therein buttresses the conclusion we have reached through constitutional analysis — that Moon's right of confrontation guaranteed by Article 21 of the Maryland Declaration of Rights and the Sixth Amendment to the United States Constitution was denied when the trial court did not require the testimony of the technician before admitting the alcohol test results.

JUDGMENT OF THE COURT OF SPECIAL APPEALS REVERSED AND CASE REMANDED TO THAT COURT TO REVERSE THE JUDGMENT OF THE CIRCUIT COURT FOR CARROLL COUNTY AND REMAND TO THAT COURT FOR A NEW TRIAL. CARROLL COUNTY TO PAY THE COSTS.

CRAIG W. MOON	*	IN THE
Appellant	*	COURT OF APPEALS
v.	*	OF MARYLAND
STATE OF MARYLAND	*	Sept. Term, 1982
Appellee	*	No. 87
	*	July 19, 1984

* * * * * * *

OPINION

Dissenting opinion by Rodowsky, J., in which Smith and Menchine, JJ., concur.

I respectfully dissent.

The issue is whether admitting Moon's hospital record into evidence, including particularly the results of the blood alcohol test, violated Moon's right "to be confronted with the witnesses against him." U.S. Const. Amendment VI. Here the business records statute was the exclusive basis for evidentiary competency. But the Confrontation Clause does not prohibit a court in a criminal case from receiving into evidence a hospital record reporting the objective results of a scientific test which was ordered for purposes of treatment and which was conducted by a technician who is independent of the police. In my view the conclusion of the majority is

not only legally incorrect but, by placing its holding on constitutional grounds, the Court needlessly brings into question the use in Maryland criminal cases of the most trustworthy exceptions to the hearsay rule.

Moon's file from University Hospital came into evidence as a business record under Md. Code (1974, 1984 Repl. Vol.), §10-101 of the Courts and Judicial Proceedings Article. The foundation for admission was by a stipulation, the effect of which was as if a mere custodian of the records who had no personal knowledge had testified. Moon's trial counsel, in arguing against admissibility of the laboratory report, at times made statements somewhat inconsistent with his having stipulated a foundation for §10-101 admissibility. I take it that the majority has concluded that Moon's counsel did stipulate to a sufficient foundation for admitting the exhibit under the statute. Obviously, if the State failed to lay a proper foundation, this case should be resolved under Maryland evidence law and the Court should not address the constitutional issue.

At the constitutional level, the Supreme Court "has not sought to 'map out a theory of the Confrontation Clause

that would determine the validity of all . . . hearsay "exceptions."" Ohio v. Roberts, 448 U.S. 56, 64-65, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980) (quoting California v. Green, 399 U.S. 149, 162, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970)). Roberts is the most recent opinion of the Court on the Confrontation Clause. In footnote 9 to Roberts, id. at 66-68, the Court reviewed the outpouring of scholarly commentary triggered by "[t]he complexity of reconciling the Confrontation Clause and the hearsay rules" but refused to adopt any one theory as controlling.

Roberts does, however, advise that "a general approach to the problem is discernible." Id. at 65.

> The Confrontation Clause operates in two separate ways to restrict the range of admissible hearsay. First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case . . . the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant. [Id.]

That statement is immediately qualified by footnote 7 in Roberts which in part reads (id.):

> [7]A demonstration of unavailability, however, is not always required. In Dutton v. Evans, 400 U.S. 74 (1970), for example, the Court found the utility of trial confrontation so remote that it did not require the prosecution to produce a seemingly available witness.[1]

The Supreme Court in Roberts then described the second aspect of confrontation which

> operates once a witness is shown to be unavailable. Reflecting its underlying purpose to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence, the Clause countenances only hearsay marked with such trustworthiness that "there is no material departure from the reason of the general rule." Snyder v. Massachusetts, 291 U.S., at 107. [Id.]

Roberts approved the State's placing in evidence during its rebuttal case the transcript of testimony which an unavailable witness had given at a preliminary hearing. The case before us deals with a business record. Nevertheless, dicta in

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[1] Dutton approved, on its facts, use against the accused of an oral admission made by a coconspirator of the accused to the witness, a fellow prisoner of the coconspirator.

Roberts answers the Sixth Amendment question presented here.

> The Court has applied this "indicia of reliability" requirement principally by concluding that certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the "substance of the constitutional protection." Mattox v. United States, 156 U.S., at 244.[8] This reflects the truism that "hearsay rules and the Confrontation Clause are generally designed to protect similar values," California v. Green, 399 U.S., at 155, and "stem from the same roots," Dutton v. Evans, 400 U.S. 74, 86 (1970). It also responds to the need for certainty in the workaday world of conducting criminal trials. [Id. at 66.]

Footnote 8 (omitted from the majority's discussion of Roberts) tells us:

> [8]See, e.g., Pointer v. Texas, 380 U.S., at 407 (dying declarations); Mattox v. United States, 156 U.S., at 243-244 (same); Mancusi v. Stubbs, 408 U.S. 204, 213-216 (1972) (cross-examined prior-trial testimony); Comment, 30 La. L. Rev. 651, 668 (1970) ("Properly administered the business and public records exceptions would seem to be among the safest of the

> hearsay exceptions"). [Emphasis added]

And see Dutton v. Evans, 400 U.S. 74, 95-96, 91 S. Ct. 210, 27 L.Ed.2d 213 (1970) (Harlan, J., concurring).

Here the fact which the State seeks to prove by the introduction of the laboratory report is that the ethyl alcohol concentration of Moon's blood sample was 165 milligrams per deciliter. In the language of the hearsay rule the "declarant" is the laboratory technician who performed the test which yielded that measurement. From the standpoint of the first aspect of the Confrontation Clause-hearsay exceptions relationship as discussed in Roberts, the declarant is in effect unavailable because it would be pointless for the State to call him as an accuser. Experience teaches us that the technician, even if called to the stand, would have to rely on the hospital's record of the test result in order to testify accurately, or at all. From the trustworthiness standpoint, Roberts tells us that the business records exception to the hearsay rule is like a dying declaration, or like cross-examined prior-trial testimony, so that virtually any evidence within the business record exception comports with the substance of the Confrontation Clause protection.

Likely because these conclusions are so well-established in practice, the United States Supreme Court appears never substantially to have addressed a Confrontation Clause objection to business records evidence. The point was, however, a minor issue in Heike v. United States, 227 U.S. 131, 33 S.Ct. 226, 57 L.Ed. 450 (1913). That was a prosecution for customs fraud accomplished by the secret insertion of springs into some of the scales used by tax collectors so that imported sugar was underweighed. The Goverment sought to prove that the actual weights were higher than those recorded by customs agents. To do this the Government offered business records, called "pink books," of other weighings of the same cargoes made by persons called the "city weighers" whose measurements were used by the defendant company to compute how much it was to pay for the sugar. Persons who made the entries in the pink books identified them. Cross-examination revealed that often those persons did not see the reading on the scale but simply wrote down what a city weigher told them. Hearsay! The declarants are the city weighers. In answer to a Confrontation Clause argument the Second Circuit had said

simply that "the witnesses whose testimony made the records admissible testified before the jury, and were cross-examined, or opportunity given for cross-examination. . . ." Heike v. United States, 192 F. 83, 97 (2d Cir. 1911). On certiorari the Supreme Court, through Justice Holmes, recognized that the city weighers had not been called as witnesses but found no error for the reason, among others, that the pink books had been accepted by the defendant company. 227 U.S. at 145. In the present case the Sixth Amendment imposes no greater requirement on the State to call the University Hospital laboratory technician than it imposed on the federal government to call the city weighers in Heike.

Moon has not referred to, the majority has not cited, and my research has not disclosed any decision holding that the admission of a hospital record containing an independent observer's report of scientifically objective findings made in the course of treatment violates the Confrontation Clause when the record is admitted through a custodian who is not the declarant. In the following cases courts held that the introduction of hospital records as business records did not

offend the Sixth Amendment: United States ex rel. Henson v. Redman, 419 F.Supp. 678 (D. Del. 1976) (emergency room record noting lacerated vagina and bleeding hymen of rape victim); United States ex rel. Lurry v. Johnson, 378 F.Supp. 818 (E.D. Pa. 1974), aff'd, 510 F.2d 971 (3d Cir. 1975) (same; also presence of spermatozoa); Pickett v. State, No. 3, Div. 504 (Ala. Crim. App. November 23, 1982), reh'g denied, December 28, 1982 (description of vaginal trauma of rape victim); Henson v. State, 332 A.2d 773 (Del. Super. 1975) (emergency room record describing injuries of rape victim); State v. Torres, 60 Hawaii 271, 589 P.2d 83 (1978) (X-rays of accused showing lodged near the spine an object later identified by expert witness as a .22 caliber bullet); State v. Simpson, 625 S.W.2d 957 (Mo. App. 1981) (description of rape victim's hysteria and bruises); State v. Spikes, 67 Ohio St. 2d 405, 423 N.E.2d 1122 (1981), appeal dismissed sub nom. Spikes v. Ohio, 454 U.S. 1131, 102 S.Ct. 986, 71 L.Ed.2d 284 (1982) (description of victim's injuries in aggravated robbery case); Hagenkord v. State, 100 Wis. 2d 452, 302 N.W.2d 421 (1981) (finding of sperm in vagina of rape victim and vaginal injuries); State v. Olson, 75 Wis. 2d 575, 250 N.W.2d 12 (1977)

(description of injuries of victim where charge was "endangering safety by conduct regardless of life. . . .").

There is another class of criminal case in which accused persons have argued that the introduction of business or public records violated the Confrontation Clause. Those cases arise when the record placed in evidence is the report by a scientist employed by the state to determine whether the matter tested is evidence of crime. Frequently the report is introduced through a custodian, or through a supervisor, or pursuant to a statute authorizing authentication by a certificate. The majority rule in those cases is that there is no Confrontation Clause violation. See Imwinkelried, The Constitutionality of Introducing Evaluative Laboratory Reports Against Criminal Defendants, 30 Hastings L.J. 621 (1979). The majority taking this no-violation position appears to be substantial. See, e.g., Kay v. United States, 255 F.2d 476 (4th Cir.), cert. denied, 358 U.S. 825, 79 S. Ct. 42, 3 L.Ed.2d 65 (1958) (blood alcohol report admitted under certificate in drunk driving case); Montgomery v. Fogg, 479 F.Supp. 363 (S.C.N.Y. 1979) (autopsy report in murder case); State v. Huggins, 659 P.2d 613 (Alaska App. 1982) (admission

under certificate of foundation evidence, such as calibration, for admission of breathalyzer examination results); State v. Cosgrove, 181 Conn. 562, 436 A.2d 33 (1980) (state toxicologist's report that substance is marijuana); Howard v. United States, 473 A.2d 835 (D.C. 1984) (Drug Enforcement Agency chemist's certified report that substance is heroin); State v. Rhone, 555 S.W.2d 839 (Mo. 1977) (admission through custodian of police laboratory microscopic and spectrographic comparison of fibers in accused's clothing to materials on roof of burglarized building); State v. Malsbury, 186 N.J. Super. 91, 451 A.2d 421 (1982) (report from county forensic science laboratory that substance is marijuana); People v. Porter, 46 A.D.2d 307, 362 N.Y.S.2d 249 (1974) (blood alcohol test in drunk driving case conducted by private laboratory hired by police; lab notes of chemist, who was deceased at time of trial, identified by coworker); Burleson v. State, 585 S.W.2d 711 (Tex. Crim. App. 1979) (autopsy admitted in murder case through secretary who transcribed notes of the medical examiner; latter attending professional meeting in California at time of trial); Robertson v. Commonwealth, 211 Va. 62, 175 S.E.2d 260 (1970) (attested report by medical

examiner that vaginal swabs from victims in rape case contain seminal fluid); State v. Kreck, 86 Wash. 2d 112, 542 P.2d 782 (1975) (en banc) (report by state chemist in murder case that victim's blood contains chloroform; chemist in Germany).

If the reports in the foregoing cases are sufficiently trustworthy as not to offend the Confrontation Clause, then the laboratory report of the results of an objective test conducted on Moon's blood by an independent technician acting at the request of attending physicians at University Hospital cannot violate the Confrontation Clause.

The minority view in this second class of case is illustrated by Reardon v. Manson, 491 F.Supp. 982 (D. Conn. 1980), cause remanded, 644 F.2d 122 (2d Cir. 1981) and by State v. Henderson, 554 S.W.2d 117 (Tenn. 1977). Reardon involved two federal habeas corpus cases. The Second Circuit reversed and remanded both cases for reconsideration under 28 U.S.C. §2254(d) and Sumner v. Mata, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981) in light of the contrary factual findings which had been made in the same cases by

the Supreme Court of Connecticut. See Reardon v. Manson, 644 F.2d 122 (2d Cir. 1981).

Henderson, supra, excluded a state toxicologist's report identifying substances to be LSD and marijuana. The Supreme Court of Tennessee distinguished the case before it from a case like that before this Court when it said:

> "Yet it must also be noted that the records in this case, while they may satisfy the technical requirements of [the Tennessee business records as evidence statute], do not fit the classic business records mold, i.e. 'shop books' or hospital records. Entries in such records are considered reliable because they are made in the course of business and are routinely relied upon by others in carrying on the affairs of the business. In the case of hospital records, medical personnel make life and death decisions as a result of reports and record entries. Such documents are true 'business records,' and their trustworthiness stems from the fact that they are 'prepared for other use and only incidentally found pertinent to litigation.'" [554 S.W.2d at 120 (quoting lower court's opinion).]

Under confrontation principles applied by the United States Supreme Court, and by state and federal courts, Moon's hospital record was admissible. Nevertheless the

majority says that the admission of this particular record as a business record violated Moon's right of confrontation because the record on its face raised possible questions as to its trustworthiness.

Before addressing the majority's analysis some additional background facts should be stated. After the State Police helicopter had flown Moon from the death scene to University Hospital, he was admitted into the shock trauma unit at 2:06 a.m. His injuries included internal abdominal bleeding, a broken left arm, through and through lacerations of the cheek and a head injury. The admitting note describes Moon as "combative, agitated, moving all extremeties, verbalizing in incoherent manner." By 2:15 a.m. six "blood gas" tests had been performed. By 2:30 a.m. 14 additional tests had been performed on Moon, including the osmolaliaty test which was indicative of high blood alcohol. By 2:49 a.m. orders had been directed to various laboratories by means of preprinted forms designed to permit the attending physician merely to check the type of test or screening desired. For the patient then identified as "Male Doe 8515," i.e., Moon, the doctors directed such orders to the "microbiology" lab,

the "chemisty-24 hour lab," the "hematology II-stat 24 hour lab," the "chemistry automated" lab, the "chemistry-immunoassay" lab and the "toxicology" lab. This latter order resulted in the report on which the issue in this case principally focuses. The report came into evidence as part of State's Ex. 4, the complete University Hospital record on Moon. This one-page report, which includes the blood alcohol result, was also separately marked as State's Ex. 4A.

The parties stipulated that State's Ex. 4 is the original hospital record. There is no question about the authenticity of Exs. 4 or 4A. What the majority really holds is that Ex. 4A is not trustworthy. One reason given is that the "hospital records were silent as to the kind of blood alcohol test performed." Doctor Yale H. Caplan, the chief toxicologist for the State of Maryland in the Medical Examiner's Office, testified that, while a blood test for alcohol can be done in several ways, "it is basically an objective chemical analysis of blood for a specific substance." From the trustworthiness standpoint it makes no difference which of several "objective" methods was used. The majority says that Moon's counsel "had a sound basis for inquiring . . . if the technician

was qualified to conduct the test." It was stipulated that the hospital record was made in the ordinary course of business. In the face of this stipulation the majority says that, unless the technician testifies as to his qualifications and is subject to cross-examination, admitting a University Hospital lab report into evidence as a business record violates constitutional safeguards. This is really holding, out of thin air, that laboratory tests are presumed to be conducted by unqualified technicians in ordinary course at University Hospital, so that the State must explicitly prove the contrary.

The majority emphasizes that Ex. 4A is dated February 21, 1979, while space on that report headed, "Time," is completed "2-18-79 2^{49} AM." At a pretrial hearing on Moon's motion to suppress the toxicology report, defense counsel informed the court that, based upon counsel's interview with the attending physician, 2^{49} AM refers to the time when the attending staff took the specimens to be tested. The order to the toxicology lab reflects that the physician initially checked a preprinted block to request a "drug abuse screen," then marked that order "void" and by longhand requested a "General Drug Screen." State's Ex. 4A, reporting on the

"general screen," is a form reflecting that tests were conducted for three types of alcohol and for 15 other substances. The alcohol tests and two others utilized blood while the remaining tests were performed on a urine specimen. All tests other than that for ethyl alcohol were negative. I fail to see how Ex. 4A on its face demonstrates that its admission into evidence is an unconstitutional application of the Maryland business records statute. Because the parties stipulated that Ex. 4, which includes 4A, was prepared in the ordinary course of business, for purposes of this appeal the conclusion should be that a general drug screen to test blood and urine for 18 substances can take three days from request to written report. The conclusion should not be that the report is untrustworthy.

Nevertheless, the majority creates a constitutional right out of the possibility that "counsel may have addressed on cross-examination" whether "chemical agents were added to the blood to maintain its stability, if the blood was deposited in a container to avoid evaporation, and if the blood was properly refrigerated to prevent putrefaction." In other words, the risk of University Hospital personnel in the

ordinary course of business altering, adulterating or contaminating a specimen preserved for laboratory analysis is considered by the majority to be so great, and the report of the laboratory analysis therefore so untrustworthy, that the ordinary application of the business records statute must be constitutionally restricted. In this respect the majority's rhetoric ignores the appellate record. At the hearing on the suppression motion defense counsel, with the acquiesence of the State, advised the court what the testimony of the attending physician would be were he called to testify.

> In conversations with Doctor Millitello, he indicated that the bottom line where it has the time, is when the blood was drawn. But this particular test, this analysis of the blood alcohol, was not done until February the 21st, 1979, and that's . . . the reason for that other date that appears on there — apparently, they take a number of samples during the course of the treatment and they're put in the freezer-refrigerator or some such thing. And then when it comes time to do the analyses, they just analyze all of the samples at one time, whether that be for economy or whatever. Doctor Millitello himself wasn't sure as to why it's done that way, but apparently that's the way it is done. . . . I think that those are the facts. [The

> State's Attorney] may have some others to add when it comes to his turn.

This representation by defendant's counsel furnished part of the basis for the circuit court's ruling that the toxicology report was admissible. Moon does not attempt to retreat from those representations in his brief to this Court, and indeed would not be permitted to do so. Yet the majority reverses Moon's conviction by speculating that the facts might be contrary to Moon's own representations to the trial court.

Curiously, another factor which is said to comprise the constitutional violation is that cross-examination might have "elicited from the technician that the test was conducted on the 21st in response to a police request. . . ." State v. Moon, 291 Md. 463, 436 A.2d 420 (1981) (Moon I) arose on the identical appellate record now before us. There we said that the "order from Moon's attending physician for a general drug screening test" and the form of report "effectively refute any suggestion that somehow there was a conspiracy between the State Police and University Hospital . . . to obtain the . . .

blood alcohol content in circumvention of the statute." Id. at 466, 436 A.2d at 421.

Next we are told that "[i]t would be logical for counsel to inquire how blood drawn on the 18th and tested on the 21st had any diagnostic value for treatment already received." In this respect the majority presupposes that treatment ceased by February 21 although Moon remained hospitalized until March 6. In my view, the fact that an attending physician, as part of the immediate and total response in the shock trauma unit, ordered a general drug screen makes the report of the test results sufficiently pathologically germane to be beyond constitutional objections.[2] In any event Moon could not conceivably have a right of confrontation to cross-examine the hearsay declarant concerning the medical reasons for ordering the general drug screen. The hearsay declarant is the laboratory technician, a Dennis Seabolt, who made a blood alcohol finding and recorded the result. Why the tests

---

[2] Because Moon was incoherent and violent and also had a head injury, the physicians in the shock trauma unit may well have been looking for any help they could get to determine whether Moon's behavior resulted from his injuries or from some other cause, e.g., drugs.

were ordered by Doctor Millitello was a medical decision. Ordinarily a laboratory technician is not qualified to give expert testimony concerning the reasons underlying a medical decision.

As I see it, the fundamental error in the majority's rationale is the elevation of speculation above evidentiary fact and common experience. The majority uses the subjunctive mood to present its discussion of the untrustworthiness of Moon's University Hospital record. What Moon's counsel "might" have asked is the sole concern. Under this analysis it is immaterial that the centuries of experience dating from adoption of the shop book rule make it most unlikely that the questions conjured by the majority would produce any answers evidencing a lack of trustworthiness in the hospital record. Thus, the standard for passing constitutional muster moves from the generally accepted reliability of the record to whether defense counsel "might" want to ask some questions. Only such a Kafkaesque standard could convert the admission of reports on which life or death decisions are regularly based into a constitutional violation.

When Moon's new trial is held, and Dennis Seabolt testifies on cross-examination that all he knows is that his report accurately recorded his observations, what will the majority have accomplished?

Judges Smith and Menchine have authorized me to state that they join in the views expressed in this dissenting opinion.

CRAIG WESLEY MOON	*	IN THE
Appellant	*	COURT OF
v.	*	SPECIAL APPEALS
STATE OF MARYLAND	*	OF MARYLAND
Appellee	*	Sept. Term, 1980
	*	No. 154
	*	June 23, 1982

* * * * * * *

OPINION

Gilbert, C.J., Morton, Moore, JJ.

The Court of Appeals granted certiorari in the case of Craig Wesley Moon v. State of Maryland, No. 33, September Term, 1982, and issued the following "Per Curiam Order" on June 8, 1982:

> "ORDERED, by the Court of Appeals of Maryland, that the above entitled case be, and it is hereby, remanded to the Court of Special Appeals, without affirmance or reversal, with instructions to answer the question 'Were the results of Petitioner's blood alcohol and osmolality tests admitted into evidence in violation of his constitutional right of confrontation?' and that said case be advanced on the Court's docket for consideration and disposition."

It is our view that the admission of Moon's blood alcohol and osmolality tests was not in violation of his constitutional right of confrontation.

The record shows that prior to offering the blood alcohol and osmolality tests into evidence at his trial, the State called Dr. Yale H. Caplan, Chief Toxicologist for the State of Maryland, who testified as follows:

> "BY MR. LOVE [Deputy State's Attorney]:
>
> Q. Doctor Caplan, the osmolality, the test that shows osmolality, is that an objective or subjective test?
>
> A. Oh, it's an objective test.
>
> Q. It's a scientific test?
>
> A. Yes.
>
> Q. And is the level of osmolality, is that a matter of opinion or is that a matter of a test result?
>
> A. No, it's a matter of a test result."

Prior to this testimony Dr. Caplan, in response to a question by the prosecuting attorney, stated:

> "That means that as the osmolality increases, it increases in a fixed

> relationship with the blood alcohol concentration. Although we should point out that this is much more variable a situation than is the actual blood alcohol analysis, which is a very definitive type of test, with a high degree of precision and accuracy."

Thus, the record shows that we are dealing with objective tests the results of which are achieved by technicians whose personal or professional opinions in no way contribute to or affect the results. The process is comparable to adding a column of figures. The result of the addition is never altered by any personal opinion that may be held by the individual performing the addition.

In Grover v. State, 41 Md. App. 705 (1979), this Court was confronted with an issue similar to the one we are here directed to resolve. In Grover the appellant contended that the admission of an autopsy report into evidence was in violation of his constitutional right of confrontation because it contained a statement by Dr. Biagio Azzarelli, a neuropathologist, who did not testify. Dr. Azzarelli's statement was entitled "Brain Note" which gave a rather elaborate description of his findings after examining the deceased's brain. Judge Thompson, who authored the Grover opinion,

referred to and quoted from the opinion of this Court in Gregory v. State, 40 Md. App. 297 (1978). He stated:

> "In Gregory v. State, supra, we noted that the field of forensic psychiatry was an inexact science and that differences of opinion frequently existed between experts in the field. This being so, we concluded that the opportunity to cross-examine a witness giving such opinion evidence could be of crucial importance. It should not be supposed that Gregory stands for the proposition that the confrontation clause of the constitution precludes the admission of all evidence under exceptions to the hearsay rule. Dr. Azzarelli's statement in the autopsy report did not express any opinion. It merely stated his findings of the physical condition of the decedent's brain. As such it falls under the category of a 'fact or condition objectively ascertained,' and was probably admissible as a business record as provided by the Md. Code, Courts and Judicial Proceedings Article, Section 10-101. It was clearly admissible under Md. Code, Article 22, §8 which has been construed by Benjamin v. Woodring, 268 Md. 593, 608, 303 A.2d 779 (1973) to make autopsy reports admissible as to facts, but not as to opinions." (Footnote omitted.) 41 Md. App. 710-711.

We are of the opinion that the results of the blood alcohol and osmolality tests administered to Moon fall in the category of a "fact or condition objectively ascertained. . . ," since they involved no opinion or subjective viewpoint of the individual administering the tests. Thus, the admission of the tests into evidence did not violate Moon's constitutional right of confrontation.

In any event, there was nothing to prevent Moon's trial counsel from calling the technician who performed the respective tests as his witness and conducting an interrogation concerning the details of the procedures followed in performing the tests.

JUDGMENTS AFFIRMED;

COSTS TO BE PAID BY APPELLANT.

CRAIG WESLEY MOON	*	IN THE
Appellant	*	COURT OF APPEALS
v.	*	OF MARYLAND
STATE OF MARYLAND	*	Sept. Term, 1982
Appellee	*	No. 33
	*	June 8, 1982

* * * * * * *

PER CURIAM ORDER

Murphy, C.J., Smith, Eldridge, Cole, Davidson, Rodowsky, Couch, JJ.

It is this 8th day of June, 1982

ORDERED, by the Court of Appeals of Maryland, that the above entitled case be, and it is hereby, remanded to the Court of Special Appeals, without affirmance or reversal, with instructions to answer the question "Were the results of Petitioner's blood alcohol and osmolality tests admitted into evidence in violation of his constitutional right of confrontation?" and that said case be advanced on the Court's docket for consideration and disposition.

/s/ Robert C. Murphy
Chief Judge

Judge Eldridge would have decided the question presented.

CRAIG WESLEY MOON	*	IN THE
Appellant	*	COURT OF
v.	*	SPECIAL APPEALS
STATE OF MARYLAND	*	OF MARYLAND
Appellee	*	Sept. Term, 1980
	*	No. 154
	*	February 10, 1982

* * * * * * *

OPINION

Gilbert, C.J., Morton, Moore, JJ.

In State v. Moon, 291 Md. 463 (1981), the Court of Appeals reversed the holding of this Court in Moon v. State, No. 154, September Term, 1980, per curiam opinion filed October 30, 1980.

Moon had been convicted in the Circuit Court for Carroll County on two counts of manslaughter by automobile (Md. Ann. Code, art. 27, §388) and one count of driving while intoxicated (Md. Transp. Code Ann. §21-902). This Court held that a test administered to Moon to determine the alcoholic content of his blood was improperly admitted at his trial and reversed his conviction. The Court of Appeals, in a split decision, held the test was admissible. It reversed the

decision of this Court and remanded the case for consideration of issues raised by Moon which we had found unnecessary to decide. We now proceed to consider those issues.

In his original appeal to this Court, Moon had contended that the trial court should have excluded evidence of his erratic driving "at distances more than one mile and one-half from the scene of the accident." The testimony of a witness at the trial as to Moon's erratic driving prior to the accident was admitted over objection. The short answer to Moon's contention is found in Reid v. Humphreys, 210 Md. 178 (1956), where it was said, at 185:

> "Generally, the admissibility of testimony as to the speed or reckless operation of a motor vehicle at some distance from the place where it afterwards collided with another vehicle is discretionary with the trial court, and a ruling admitting such evidence will not be disturbed on appeal in the absence of a clear abuse of discretion."

Here we find no clear abuse of the trial judge's discretion in admitting the testimony.

Appellant finally contended that the court below was "clearly in error in finding the defendant guilty of man-

slaughter" because "[t]here was no evidence of impairment or intoxication at the time of accident"; and "[t]here was no evidence of gross negligence or wanton and reckless indifference to human life." We disagree.

As a result of the ruling of the Court of Apeals in this case, there was properly before the court below evidence that when a blood test was administered to the appellant some hours after the accident, it showed the existence of .165 percent of alcohol in his bloodstream which, of course, is prima facie evidence of intoxication. Md. Courts & Jud. Proc., §10-307. We simply cannot subscribe to appellant's contention that this evidence "standing by itself . . . is no evidence of impairment or intoxication at the time of the accident." This evidence, however, did not stand by itself. There was evidence from witnesses who extricated appellant from his car and who transported him by helicopter to the hospital that they detected alcohol on his breath and that he was combative during the entire trip to the hospital.

The trial judge found, and we cannot say he was clearly erroneous (Maryland Rule 1086), that the accident occurred in the victims' lane of traffic. There was evidence

of appellant's erratic driving just prior to the accident. Moreover, there was no evidence of skid marks which would indicate that appellant made no effort to apply his brakes or swerve to avoid the accident.

The crime of manslaughter by automobile is a statutory misdemeanor. Code, art. 27, §388. As Judge Moore said for this Court in Boyd v. State, 22 Md. App. 539, 549 (1974): "The gist of the crime is causing the death of another by driving in a 'grossly negligent manner.'" Gross negligence has been defined as conduct amounting to a wanton or reckless disregard for human life. Boyd, supra, at 550.

From our review of the record, we are satisfied that there was sufficient evidence to sustain the trial judge's finding that appellant's conduct amounted to wanton or reckless disregard for human life and that the court was not clearly erroneous in holding that appellant was guilty of violating the provisions of Code, art. 27, §388.

JUDGMENTS AFFIRMED;

COSTS TO BE PAID BY APPELLANT.

STATE OF MARYLAND	*	IN THE
Appellant	*	COURT OF APPEALS
v.	*	OF MARYLAND
CRAIG WESLEY MOON	*	Sept. Term, 1980
Appellee	*	No. 141
	*	Oct. 14, 1981

* * * * * * * * *

OPINION

SMITH, J., delivered the opinion of the Court. ELDRIDGE and DAVIDSON, J.J., dissent. DAVIDSON, J., filed a dissenting opinion in which ELDRIDGE, J., concurs.

We shall here hold that the exclusionary provisions of Maryland Code (1974, 1979 Cum. Supp.) §10-309, Courts and Judicial Proceedings Article, are not applicable to evidence of the blood alcohol content of an accused where the blood was extracted for the purpose of treatment. Hence, we shall reverse the determination to the contrary by the Court of Special Appeals in its unreported opinion in this case.

Craig Wesley Moon was convicted in a nonjury trial in the Circuit Court for Carroll County on two counts of manslaughter by automobile (Code (1957, 1976 Repl. Vol.) Art. 27, §388) and one count of driving while intoxicated (Code (1977) §21-902(a), Transportation Article). On appeal the Court of Special Appeals relied on Loscomb v. State, 45 Md. App. 598, 612-13, 416 A.2d 1276 (1980), aff'd, 291 Md. 424, 435 A.2d 764 (1981), a case involving analysis of blood extracted at a hospital by express direction of a police officer without the consent of the accused but while he was conscious. A citation had already been issued to him at that time charging him with operating a vehicle in violation of §21-902, Transportation Article. The Court of Special Appeals reversed, holding that the evidence must be excluded because there had not been compliance with the statute in question. In the process of its opinion reference was made to Major v. State, 31 Md. App. 590, 358 A.2d 609, cert. denied sub nom. Flanagan v. State, 278 Md. 722 (1976), and the fact that the blood sample here was not obtained within the two hour limitation imposed by §10-303. We granted the State's petition for the writ of certiorari.

The facts relevant to the contentions before us may be briefly stated. They are gleaned from the agreed statement of facts presented by the parties pursuant to Maryland Rule 828 g.

Moon was involved in an automobile accident in Carroll County, north of Westminster, at approximately 12:34 a.m. on February 18, 1979, on the road from Westminster to Gettysburg, Pennsylvania, via Littlestown, Pennsylvania, then known as U.S. Route 140, now Md. 97. Moon was traveling north. His car collided with a southbound vehicle. The driver and passenger in that car were both killed.

Moon was transported via State Police helicopter to the Shock Trauma Unit of University Hospital in Baltimore City. We do not know precisely when he arrived there, but we infer that it was prior to 1:30 a.m. since we note in the hospital record reference to an x-ray examination said to have been made at that hour.

At 2:30 a.m. an osmolality test was administered. At trial, Dr. Yale H. Caplan, Chief Toxicologist of the State Medical Examiner's office, testified that the value of 347 recorded on that test was "consistent with an alcohol

concentration of approximately . . . .15 or .16." He added, "But this is not as definitive a test of alcohol, this is really only an indicator. It's not really a definitive determination of alochol, but it allows an early assessment of whether alcohol might be involved."

There is in the record an order from Moon's attending physician for a general drug screening test. The prepared form of report for such a test includes alcohol, amphetamines, barbiturates, dilantin, librium, methadone, opium alkaloids, salicylates, and valium, among others, for which tests are to be made. Items added to the form in longhand in this instance include quinine, acetaminophen, and placidyl. The physician's direction and the form of report effectively refute any suggestion that somehow there was a conspiracy between the State Police and University Hospital, another State agency, to obtain the information as to blood alcohol content in circumvention of the statute. The record indicates that the specimen of blood was taken at 2:49 a.m. on

February 18. The report shows a blood alcohol content of 0.165%.[1]

The trial judge in his opinion summarized, correctly, certain of the testimony of Dr. Caplan:

> In the opinion of Doctor Caplan, a blood alcohol level of .165 represents a significant concentration of alcohol in the blood system. Doctor Caplan testified that at a level of .08 all people are affected by alcohol in the system, and as the level rises, as in this case twice the normal level as considered by Doctor Caplan, twice the minimal level, the person so affected tends to have increased self-confidence, decreased concentration, elements of impaired vision, which could

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[1] The agreed statement of facts says, "[A]n analysis of the blood for alcohol content was not performed until February 21, 1979." It is true that the report bears that date. We strongly suspect that the parties have drawn an erroneous inference, the date being when the results of the tests were written up, not when they were performed, just as, for instance, certain x-ray reports show the examination as having been done on February 18 but indicate that the written report was prepared or transcribed on February 27. An obvious purpose for the drug test would be for the attending physician to be certain that anything he prescribed would not run counter to that already in his patient's system, just as some pharmacies monitor prescriptions to be certain that the consumer is not using antagonistic drugs. See Md. Bd. of Pharmacy v. Sav-A-Lot, 270 Md. 103, 109, 311 A.2d 242 (1973). The purpose of the test would not be served were it not available to the physician until three days later.

> possibly lead to double vision; and it causes the individual so affected by the use of alcohol to take a longer period of time to respond to certain situations leading to an increase in reaction time.[2]

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[2] The agreed statement of facts says, "Dr. Caplan also stated that he did not agree with the provisions contained in Courts Article §10-307." In his testimony he indicated that efforts in Maryland to lower the amount of blood alcohol concentration required for prima facie evidence that one was intoxicated had not been successful. He stated that there was more scientific evidence available today than when the standard was originally adopted. His view that the then Maryland standard was too lenient is shared by others. See, e.g., H. Campbell, Courts and Prosecutors Are the Weak Link in Preventing Drunken Driving, 46 A.B.A.J. 43, 45 (1960), and R. Forney, Sr., and R. Forney, Jr., Prosecution of Drivers Impaired by Ethanol or Other Chemicals, Legal Medicine Annual: 1975, 85, 89-90 (1976). Dr. Campbell was at that time Chairman of the Automotive Safety Subcommittee of the Colorado State Medical Society and Vice-Chairman of the American Medical Association's Committee on Medical Aspects of Automobile Injuries and Deaths. R. Turner, H. Heise, and C. Muehlberger, Interpretation of Tests for Intoxication, Chemical Tests for Intoxication Manual, Committee on Medicolegal Problems, American Medical Association 57, 60 (1959), state, "In the countries of Western Europe the limiting values are more stringent. Norway and Sweden have adopted 0.05% as the blood alcohol limit which may not be exceeded by motorists. In Denmark, Germany, and France, the limit is one part per thousand or 0.10%. So the ceiling value of 0.15%, recommended in the Uniform Vehicle Code and adopted into the statutes of 28 of our states, is in keeping with our American tradition of permitting the maximum freedom for the individual which does not interfere materially with public safety.

The controversy here concerns §§10-302 to -309, Courts and Judicial Proceedings Article, which were contained in Code (1957, 1971 Repl. Vol.) Art. 35, §100 prior to its recodification by Chapter 2 of the Acts of the Special Session of 1973 as a part of the Courts and Judicial Proceedings Article.

Section 10-302 states:

> In a prosecution for a violation of a law concerning a person who is driving or attempting to drive a vehicle in violation of §21-902 of the Transportation Article, a chemical test of his breath or blood may be administered to the person for the purpose of determining the alcoholic content of his blood.

Code (1977) §21-902, Transportation Article makes it unlawful for a person to drive or attempt to drive any vehicle while intoxicated; while his driving ability is impaired by the consumption of alcohol; while he is so far under the influence of any drug, any combination of drugs, or any combination of drugs and alcohol that he cannot drive a vehicle safely; and while he is under the influence of any controlled dangerous substance as the term is defined in Code (1957) Art. 27,

§279. With regard to the coverage of §21-902, Transportation Article see State v. Loscomb, supra.

Section 10-303 states that the specimen of breath or blood shall be taken within two hours "after the person accused is apprehended." Qualifications of a person administering a test and of equipment to be used are set forth in §10-304. A defendant is given the right in §10-305 to select the type of test to be administered. Provision for admissibility of test results without the presence or testimony of a technician are set forth in §10-306.

Section 10-307 states:

> (a) In general. - In a proceeding in which a person is charged with a violation of §388A of Article 27 or with driving or attempting to drive a vehicle in violation of §21-902 of the Transportation Article, the amount of alcohol in the person's breath or blood shown in chemical analysis as provided in this subtitle is admissible in evidence and has the effect set forth in subsections (b) through (e) of this section.
>
> (b) No intoxication presumed. - If there was in his blood at the time of testing 0.05 percent or less, by weight, of alcohol, as determined by an analysis of his blood or breath, it shall be presumed that the defendant was not intoxicated

and that his driving ability was not impaired by the consumption of alcohol.

(c) No presumption. - If there was in his blood at the time of testing more than 0.05 percent, but less than 0.10 percent, by weight, of alcohol, as determined by an analysis of his blood or breath, this fact may not give rise to any presumption that the defendant was or was not intoxicated or that his driving ability was or was not impaired by the consumption of alcohol, but this fact may be considered with other competent evidence in determining the guilt or innocence of the defendant.

(d) Prima facie evidence of impairment. - If there was in his blood at the time of testing 0.10 percent, or more, by weight, of alcohol, as determined by an analysis of his blood or breath, it shall be prima facie evidence that the defendant's driving ability was impaired by the consumption of alcohol.

(e) Prima facie evidence of intoxication. - If there was in his blood at the time of testing 0.15 percent, or more, by weight, of alcohol, as determined by an

> analysis of his blood or breath, it shall be prima facie evidence that the defendant was intoxicated.[3]

We have already spelled out the scope of §21-902 of the Transportation Article. Code (1957, 1976 Repl. Vol., 1978 Cum. Supp.) Art. 27, §388A pertains to a person "causing the death of another as the result of his negligent driving, operation or control of a motor vehicle while intoxicated," the word "intoxicated" being defined as having "the same meaning as indicated in and is subject to the same presumptions and evidentiary rules of §10-307 of the Courts Article regarding intoxication under the vehicle laws of this State." It is distinguishable from manslaughter by automobile, Art. 27, §388, which by its terms requires proof of gross negligence.

Section 10-308 provides that evidence of the chemical analysis does not limit the introduction of other evidence bearing upon whether an accused was intoxicated or whether his driving ability was impaired by the consumption of alcohol. Section 10-309, upon which Moon relies, states:

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[3] Chapter 242 of the Acts of 1981 significantly reduced the applicable percentages of this section effective July 1, 1981.

> (a) Test not compulsory. - A person may not be compelled to submit to a chemical analysis provided for in this subtitle. Evidence of chemical analysis is not admissible if obtained contrary to its provisions. No inference or presumption concerning either guilt or innocence arises because of refusal to submit. The fact of refusal to submit is not admissible in evidence at the trial.
>
> (b) Consequences of refusal. - This subsection does not limit the provisions of the vehicle laws regarding the consequences of refusal to submit to a chemical test or tests.

Maryland's statute relative to chemical tests to determine blood alcohol content was proposed by the Legislative Council Committee on the Revision of the Motor Vehicle Laws of the State in 1956.[4] The committee renewed its recommendation in its report to the 1959 session of the General Assembly with an additional proviso that chemical tests could not be given if the suspected person would not

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[4] It is of interest to note that the chairman of the committee was Edgar P. Silver, now a judge of the Eighth Judicial Circuit, and that committee members included Harry A. Cole, currently a judge of this Court, and George B. Rasin, Jr., now Chief Judge of the Second Judicial Circuit of Maryland.

agree to it. The General Assembly enacted Chapter 769 of the Acts of 1959 as Code (1957, 1959 Cum. Supp.) Art. 35, §100. The form in which it was enacted closely followed the 1957 committee recommendation with the addition of the provisions that no person should be compelled to submit to such tests, that no inference or presumption concerning either his guilt or innocence might arise by reason of his refusal to submit to such a test, and that the fact of his refusal to so submit should not be admissible into evidence at his trial. During the statute's trip through the General Assembly, there was added the provision that the specimen of blood, breath or urine must have been taken within two hours after the person being prosecuted was first apprehended by the arresting officer. The statute was applicable to any criminal prosecution for a violation of Code (1957) Art. 66 1/2, §206 "as amended from time to time," the latter being the then section making it unlawful "for any person who is an habitual user of narcotic drugs or any person who is under the influence of drugs or any person who is under the influence of intoxicating liquor or narcotic drugs to drive or attempt to drive any vehicle, streetcar or trackless trolley within this

State." Section 100 was also applicable to a prosecution "for a violation of any other law of this State concerning a person who is under the influence of intoxicating liquor driving or attempting to drive any vehicle as specified in such other laws. . . ." That statute provided basically as did the present prior to July 1, 1981, as to the percentages. However, as to breath it required that the amount being measured must be "two thousand cubic centimeters of his breath (true breath or alveolar air having 5 1/2 percentum of carbon dioxide)... ."[5]

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[5] R. Donigan, Chemical Tests and the Law (2d ed. 1966) explains:

> The concentration of alcohol in the exhaled (alveolar) breath coming from deep in the lungs is due to absorption from the blood as it circulates through the capillary vessels which line the air sacs of the lungs. Thus it will be proportional to the alcoholic content of the blood circulating through the lungs. This ratio is about 2,100:1. Thus, 2,100 volume units (cubic centimeters or volume ounces) of alveolar breath will contain the same quantity of alcohol as will one volume unit of circulating blood. [Id. at 13 (emphasis in original).]

To similar effect see R. Burgee, A Study of Chemical Tests for Alcoholic Intoxication, 17 Md.L.Rev. 193, 198-99 (1957), Cont'd.

The statute as originally enacted also permitted analysis of urine. Both the requirement of a given amount of air and the provision for urinalysis have been eliminated.

Instances of Maryland prosecutions using chemical analysis of blood alcohol content were known before the enactment of Art. 35, §100 in 1959. See, e.g., Lilly v. State, 212 Md. 436, 440, 129 A.2d 839 (1957), where the Court quoted from the testimony on April 16, 1956, of Dr. Henry C. Freimuth, then the Chief State Toxicologist, as to the result of the blood analysis of an individual prosecuted for manslaughter by automobile and "other testimony . . . that the intoxication point is 0.15%."

The standards contained in the original Maryland enactment and those which have remained in Maryland up until July 1 of this current year stemmed from the recommendations in 1938 of a joint committee of the National Safety Council and the American Medical

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and T. Friedemann and K. Dubowski, Chemical Testing Procedures for the Determination of Ethyl Alcohol, Chemcial Tests for Intoxication Manual, Committee on Medicolegal Problems, American Medical Association 20, 30 (1959). Thus, the 2,000 cc. of breath originally required in Maryland was close to the equivalent of 1 cc. of blood.

Association. H. Campbell, Courts and Prosecutors Are the Weak Link in Preventing Drunken Driving, 46 A.B.A.J. 43, 44 (1960); R. Donigan, Chemical Tests and the Law 23 (2d ed. 1966); and H. Porter, Value and Purpose of Chemical Tests, Chemical Tests for Intoxication Manual, Committee on Medicolegal Problems, American Medical Association 2, 3 (1959).[6] Those recommendations found themselves embodied in the Uniform Vehicle Code. Campbell, op. cit.

Minor changes were made in the statute. A major change came after the submission of the report in 1968 of the Committee to Study Revision of the Motor Vehicle Laws appointed by the Legislative Council under the chairmanship of Judge S. Ralph Warnken. It recommended an implied consent law "which provides, with many safeguards, for the suspension of driving privileges of a person who refuses to submit to breath or urine tests for blood alcohol content upon

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[6] It is of interest to note that of the eight physicians who were members of the American Medical Association Committee on Medicolegal Problems, two were from Maryland: Dr. Russell S. Fisher, then and now Chief Medical Examiner of Maryland, and Dr. Manfred S. Guttmachiner, then Medical Adviser to the Supreme Bench of Baltimore City.

arrest for offenses involving the driving of an automobile after consumption of alcohol." Id. at v. Immediately thereafter, the statute was revised into basically the present form which closely parallels the Uniform Vehicle Code and Model Traffic Ordinance. It is to be noted, however, that although the wording of the original statute was changed, its basic concepts remained unchanged. The revision of this section was by Chapter 157 of the Acts of 1969. By Chapter 158 the General Assembly adopted a provision which requires each applicant for a motor vehicle license expressly to consent to a determination of the alcoholic content of his blood, breath, or urine.

We note that Moon makes no contentions here on constitutional grounds. Indeed, he could not after the decision of the Supreme Court in Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). There an individual charged with driving an automobile while under the influence of intoxicating liquor was arrested at a hospital while receiving treatment for the injuries sustained in an accident. Upon the advice of counsel, he refused to consent to the withdrawal of blood for analysis. Nevertheless, a blood

sample was withdrawn by a physician at the direction of a police officer. Justice Brennan said for the Court, "that the privilege [against self-incrimination] protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and . . . the withdrawal of blood and use of the analysis in question in this case did not involve compulsion to those ends." Id. at 761. The Court also rejected contentions "that the chemical analysis should be excluded from evidence as the product of an unlawful search and seizure in violation of the Fourth and Fourteenth Amendments." Id. at 766. It pointed out, "We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system." Id. at 770. Accordingly, the Court "conclude[d] that the attempt to secure evidence of blood-alcohol content in th[at] case was an appropriate incident to [Schmerber's] arrest." Id. at 771. Justice Brennana said the Court "conclude[d] that the . . . record show[ed] no violation of petitioner's right under the Fourth and Fourteenth Amendments to be free of unreasonable searches and seizures." Id. at 772.

Moon has in no way been prejudiced by the fact that the sample here was withdrawn more than two hours after the incident in question. If the statute in question were applicable to the case at bar, his contentions that this delay should bar the evidence would fail for three reasons, anything in Major v. State, 31 Md. App. 590, to the contrary notwithstanding. The statute, §10-303, specifies, "The specimen of breath or blood shall be taken within two hours after the person accused is apprehended." Moon was not arrested at the time. It was some days after the incident in question before charges were preferred. Secondly, an analysis such as was done here reflects the amount of alcohol in the blood at the time it was withdrawn, not at the time of the incident. As time passes the alcohol in the blood disappears as Justice Brennan noted for the Court in Schmerber. This process is explained in lay terms in 2 Am.Jur. Proof of Facts, Blood Tests (1959):

> Tests show that five minutes after a single glass of beer, alcohol is found in the blood stream which was not there before. It is more than half absorbed within fifteen minutes, eighty per cent or so in one halfhour, and all within two hours. Being absorbed it immedi-

> ately goes into the transportation system of the body, the blood stream, and is carried all over the body and is deposited in the brain, liver, kidneys, and muscles in every part of the body that contains water. Immediately after absorption in the brain, liver, etc., the level of alcohol is about the same as that in the blood at all times. At the conclusion of the absorption process the alcohol is simply distributed throughout the whole body in proportion to the water content. [Id. at 587.]

To like effect see generally R. Donigan, Chemical Tests and the Law 44-46 (2d ed. 1966); R. Forney, Sr., and R. Forney, Jr., Prosecution of Drivers Impaired by Ethanol or Other Chemicals, Legal Medicine Annual: 1975, 85, 86-88 (1976); 3 R. Gray, Attorneys' Textbook of Medicine para. 59A.31-.32 (3d ed. 1981); 4 R. Gray, op. cit., para. 133.23-.24; and address of Lewis F. Gundry, M.D., as set forth in The Compulsory Use of Chemical Tests for Alcoholic Intoxication - A Symposium, 14 Md. L. Rev. 111, 115 (1954). Thus, a report as to the alcohol content of Moon's blood at a time more than two hours after the incident would not be less favorable to Moon than a report as to the alcohol content at a time within the two hour period. The third reason, as

explained by the Ohio court in a similar case, Barber v. Curry, 40 Ohio App.2d 346, 349-51, 319 N.E.2d 367 (1974), is the time lag would relate not to admissibility of evidence but as to the presumptions arising from the evidence.

Courts in other states have approached problems similar to that before the Court in various ways, often depending upon the statute of the individual state. For instance, in State v. Robarge, 35 Conn.Supp. 511, 391 A.2d 184 (1977), the defendant was convicted of negligent homicide with a motor vehicle. The blood sample in question was taken in the hospital emergency room in the presence of two police officers after the accused was under arrest, but without her consent. Her claim that this violated the Connecticut statute similar to the Maryland statute was said by the Court to be "wholly unsound" since its provisions "pertain[ed] only to prosecutions for the operation of a motor vehicle while under the influence of intoxicating liquor or drugs. . . ." 391 A.2d at 185. A short time later the Connecticut Supreme Court in State v. Singleton, 174 Conn. 112, 384 A.2d 334 (1977), had before it a case where the defendant was found guilty of misconduct with a motor

vehicle "in that he 'with criminal negligence in the operation of a motor vehicle or in consequence of his intoxication while operating a motor vehicle, . . . cause[d] the death of another person.'" The blood sample in that instance was taken with his consent. To his contention, however, that the evidence should be suppressed because there had not been compliance with all of the procedural requirements of the section relative to blood samples, the court said that the statute by its express terms applied to a criminal prosecution for the offense of operating a motor vehicle while under the influence of intoxicating liquor or drugs or both and that the Legislature had not made it applicable to the offense with which the defendant was charged. 384 A.2d at 336. Its position was in contrast with that of the court in People v. Keen, 396 Mich. 573, 242 N.W.2d 405 (1976). There the court held that the result of a blood alcohol test was not admissible in evidence in a prosecution for manslaughter. Consent to the test had been duly given. The statute was similar to that of Maryland. The court said, "It would exceed the scope of the consent given to allow test results obtained on the representation that they will be used in prosecutions where

the maximum penalty for a first offender is 90 days imprisonment to be used in prosecutions for a felony with a maximum penalty of 15 years." 242 N.W.2d at 411-12.

By dicta or by way of express holding, courts in Colorado, Georgia, Idaho, Minnesota, Montana, Nebraska, New York, Pennsylvania, South Dakota, and Wyoming have held statutes similar to that in Maryland do not bar admission of evidence of blood alcohol content in prosecutions for an offense such as our manslaughter by automobile. See, e.g., People v. Duemig, 620 P.2d 240, 244 (Colo. 1980), cert. denied, 101 S.Ct. 2048 (1981); Strong v. State, 231 Ga. 514, 516, 202 S.E.2d 428 (1973), cert. denied, 416 U.S. 994 (1974); State v. Fisk, 92 Idaho 675, 680, 448 P.2d 768 (1968); State v. Capelle, 285 Minn. 205, 172 N.W.2d 556, 559 (1969); State v. Campbell, 615 P.2d 190 (Mont. 1930); Hoffman v. State, 160 Neb. 375, 384, 70 N.W.2d 314 (1955); People v. Leis, 13 A.D.2d 22, 24, 213 N.Y.S.2d 138 (1961); Commonwealth v. Trefry, 249 Pa. Super. Ct. 117, 375 A.2d 786, 792-93 (1977); State v. Aarhus, 80 S.D. 569, 572, 128 N.W.2d 881 (1964); Van Order v. State, 600 P.2d 1056, 1058 (Wyo. 1979); and State v. Chastain, 594 P.2d 458, 461 n.4 (Wyo. 1979).

Other cases, usually under the peculiar wording of the statutes involved, have rejected admission of evidence in circumstances similar to the case at bar. See, e.g., People v. Todd, 59 Ill. 2d 534, 544, 322 N.E.2d 447 (1975); State v. Hitchens, 294 N.W.2d 686, 689 (Iowa 1980); and State v. Bellino, 390 A.2d 1014, 1023 (Me. 1978).

A little bit different situation was before the courts in Morrow v. State, 303 A.2d 633 (Del. 1973), and Murray v. United States, 358 A.2d 314 (D.C. 1976). Morrow was convicted of operating a motor vehicle while under the influence of intoxicating liquor. A blood sample was taken from him while he was admittedly incapable of refusing to submit to it. The Delaware statute is to the effect that any person who is unconscious or otherwise in a condition rendering him incapable of refusal to consent shall not be deemed to have withdrawn that consent. Morrow contended that upon regaining the full exercise of his faculties he should be allowed to withdraw his implied consent, notwithstanding the statutory provision. In rejecting Morrow's contention, Vice Chancellor Marvel said for the Delaware Supreme Court that to grant such a privilege "would give to the severely

intoxicated . . . an advantage over the less inebriated, the latter being required, when capable of making a choice, to decide whether or not to refuse to take the test. . . ." Id. at 635. A virtually identical contention was made in Murray. He had been convicted by a jury of two counts of negligent homicide and driving under the influence of intoxicating liquor. The court there said, "To interpret the Act to provide that unconscious motorists involved in serious accidents later could object successfully to the introduction of scientific evidence against them, while conscious motorists would be denied that right in similar circumstances, would lead to an absurd result." Id. at 319.

Moon sees the sections here before the Court as having been enacted for the protection of an accused. We see them as concerned with the protection of the public. We read the several sections together, they having been originally enacted as one section. The blood sample here simply was not taken for the purpose of prosecution. The provisions of §§10-302 to -309 are applicable to testing done for a prosecution. They are an authorization for evidence so withdrawn to be received as prima facie evidence. As we have previously indicated,

before the passage of the predecessor to §§10-302 to -309, evidence of blood alcohol content had been received in Maryland. The statute in no way provides that in no other circumstance shall evidence of blood alcohol content be received. The blood here not having been withdrawn under the provisions of that statute, its requirements as to consent simply are not applicable. Moon was not under arrest nor had he been charged. The record indicates that the blood was withdrawn as a part of routine hospital procedures. There are understandable reasons in connection with the treatment of Moon for the various tests that were made, tests that were by no means confined to alcohol but covered a broad spectrum of drugs. The evidence here is in no different position from that of any other evidence which the State might subpoena as, for instance, documentary evidence to prove that an individual had submitted a forged birth certificate to make the proof of age required by §1-106(d), Transportation Article, in connection with an original driver's license application, or that which would establish that a person had altered the odometer of a motor vehicle in violation of §22-415.

Moon would have us hold that the conviction is void because the trial judge referred in his decision to the presumptions contained in §10-307. If this reference was in error, then it was harmless beyond a reasonable doubt since in the very next paragraph he referred to the testimony of Dr. Caplan which clearly spelled out the effects of a blood alcohol concentration such as Moon had.

Because of the theory upon which the Court of Special Appeals determined Moon's appeal, it was not obliged to address certain of his contentions. Therefore, those questions must be considered on the remand.

Judgment of the Court of Special Appeals reversed and case remanded to that court for consideration of undecided issues; appellee to pay the costs.

Davidson, J., dissenting:

The first question this case presents is whether the exclusionary rule contained in Md. Code (1974, 1980 Repl. Vol.) §10-309 of the Courts and Judicial Proceedings Article, which, under certain circumstances, renders the results of chemical tests for alcohol inadmissible in evidence, is

applicable to chemical test results administered initially for the purpose of medical treatment of the accused. The majority concludes that the exclusionary rule applies to the results of chemical tests administered by, or at the direction of, a police officer initially for the purpose of prosecution but is inapplicable to tests administered by, or at the direction of, a physician for initial purpose of medical treatment. In my view, the plain meaning of the statute and its legislative history support the conclusion that the exclusionary rule contained in §10-309 is applicable to evidence of chemical test results, regardless of the purpose for which they were initially administered.

The legislative history of Md. Code (1974, 1980 Repl. Vol. & 1980 Supp.) §10-302 through §10-309 of the Courts and Judicial Proceedings Article, effective 1 January 1974, shows that these sections were preceded by Md. Code (1957, 1959 Repl. Vol.), Art. 35, §100 of the Evidence Title, effective 1 June 1959. An examination of the legislative history of Art. 35, §100 shows that as long ago as 1954, the Maryland Legislature was concerned with the problem of promoting safety on the highways through the successful prosecution of

drunk drivers. One means considered was to make the results of chemical tests for alcohol admissible in evidence. For several years, the Legislature debated whether such tests for alcohol were sufficiently reliable to be admissible. See Burgee, A Study of Chemical Tests for Alcoholic Intoxication, 17 Md.L.Rev. 193 (1957); The Compulsory Use of Chemical Tests for Alcoholic Intoxication - A Symposium, 14 Md.L.Rev. 111 (1954). Ultimately, it decided that such tests could be admitted under certain limited conditions designed to protect the accused, the primary one being that the accused affirmatively consent to the administration of the test. By creating statutory protections for the individual, the Legislature established that while its purpose was to protect the societal interest in successful prosecution of drunk drivers, that purpose was not to be accomplished at the expense of individual rights which the Legislature deemed to be essential.

In 1954, in the House of Delegates (House), House Bill (HB) No. 94 was introduced as an amendment to the Motor

Vehicles Title.[1] House Bill No. 94 authorized the admission of chemical test results in evidence in prosecutions for a violation of a specified section of the Motor Vehicles Title[2] that made it unlawful for anyone under the influence of intoxicating liquor to drive or attempt to drive any vehicle.

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[1] HB No. 94, introduced 12 February 1954, 1st reading, Committee on Judiciary, 1954 House Journal of Proceedings, pp. 198, 223, proposed an amendment to

> ". . . Section 171 of Article 66 1/2 of the Annotated Code of Maryland (1951 Edition), title 'Motor Vehicles,' sub-title 'Persons Under the Influence of Intoxicating Liquor or Narcotic Drugs,' authorizing the admission into evidence of the findings of chemical tests for intoxication, and relating generally to the provisions applying to such tests."

[2] Md. Code (1951), Art. 66 1/2, §171 provided in pertinent part:

> "(Persons Under the Influence of Intoxicating Liquor or Narcotic Drugs.) It shall be unlawful for any person who is an habitual user of narcotic drugs or any person who is under the influence of intoxicating liquor or narcotic drugs to drive or attempt to drive any vehicle, street car or trackless trolley within this State."

It also established certain presumptions to be applied in determining whether an accused was under the influence of intoxicating liquor. House Bill No. 94 contained no protections for the accused in the form of conditions relating to the circumstances under which chemical tests must be administered. In the absence of any prescribed conditions, there was no basis for an exclusionary rule and none was provided. This Bill was not enacted.

In 1955, HB No. 41 was introduced, not as an amendment to the Motor Vehicles Title, but rather as an amendment to the Evidence Title, adding §100 to Art. 35 of the Annotated Code of Maryland.[3] House Bill No. 41 broadened

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[3] HB No. 41, introduced 12 January 1955, passed in House, 1955 House Journal of Proceedings, pp. 58, 246, 259, 1st reading in Senate, Committee on Judicial Proceedings, 1955 Senate Journal of Proceedings, p. 240-41, proposed an amendment

> "to add Section 100 to Article 35 of the Annotated Code of Maryland (1951 Edition and 1954 Supplement), title 'Evidence', . . . to be under the new sub-title 'Chemical Tests for Intoxication', establishing certain tests for the amount of alcohol in the defendant's blood in any criminal prosecution for a violation of the laws concerning

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the scope of its 1954 predecessor, HB No. 94, by authorizing the admission of chemical test results in evidence in any criminal prosecution for a violation of any law concerning a person driving or attempting to drive while under the influence of intoxicating liquor. Like HB No. 94, it also established certain presumptions; it contained no express protections for the accused in the form of conditions governing the administration of the tests; and it contained no exclusionary rule. House Bill No. 41 was, however, amended to provide that

> "no person shall be compelled to submit . . . to the chemical analysis provided for in this section; and no inference or presumption concerning either his guilt or innocence shall be made by reason of his refusal to so submit to such chemical analysis." House Journal of Proceedings, at 246 (1955).

This amendment was the initial indication of a legislative intent to create statutory protections deemed to be essential for an accused. It was also the initial indication of a

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> driving or attempting to drive certain vehicles while under the influence of intoxicating liquor and establishing the evidential effect of such tests." (Emphasis added.)

legislative intent that test results be admissible only upon the condition that the accused not be compelled to submit to the test. Because the first condition created to protect an accused was that an accused not be compelled to submit to a chemical test, it is apparent that the protection of that right was deemed by the House to be essential and of paramount importance. House Bill No. 41, as amended, was passed by the House but not the Senate.

In 1956, the Legislative Council Committee on the Revision of the Motor Vehicle Laws of the State of Maryland drafted HB No. 13, introduced in 1957 as an amendment to Art. 35, the Evidence Title.[4] House Bill No. 13 as originally

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[4] HB No. 13, introduced 2 January 1957, passed in House, 1957 House Journal of Proceedings, pp. 298-99, 1st reading in Senate, Committee on Judicial Proceedings, 1957 Senate Journal of Proceedings, p. 241, proposed

> "to add Section 108 to Article 35 of the Annotated Code of Maryland (1951 Edition and 1956 Supplement), title 'Evidence' . . . to be under the new sub-title 'Chemical Tests for Intoxication', establishing certain tests for the amount of alcohol in the defendant's blood in any criminal prosecution for a violation of the laws concerning driving or attempting to drive

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introduced, authorized the admission of chemical test results in evidence in any criminal prosecution for violation of any law concerning driving or attempting to drive while under the influence or intoxicating liquor. Like its 1955 predecessor, HB No. 41, it established certain presumptions; it contained no express protections for the accused in the form of conditions governing the administration of tests; and it contained no exclusionary rule. More specifically, it did not contain a provision expressly stating that no person be compelled to submit to a chemical test. Notwithstanding the absence of such an express provision, the Committee, in its Report to the General Assembly of 1957, stated at 382:

> ". . . The proposed legislation does not require any involuntary taking of a person's blood to determine the percentage of alcohol therin. It merely establishes the evidential effect of such tests based on the percentage of alcohol found in the blood." (Emphasis added.)

House Bill No. 13, like its 1955 predecessor HB No. 41, was amended to provide expressly for certain protections for the

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> certain vehicles while under the influence of intoxicating liquor, and establishing the evidential effect of such tests."

accused. It expressly stated that no person shall be compelled to submit to a chemical test and that inference of guilt or innocence should not arise because he refused to submit to the test. More significantly, HB No. 13 was further amended to provide that

> "evidence of the said chemical analysis shall not be deemed admissible if obtained contrary to the provisions of this sub-section. . . ." House Journal of Proceedings, at 272 (1957).

This amendment established for the first time an exclusionary rule that prohibited the admission of chemical test results in evidence unless certain conditions designed to protect the accused were satisfied. It indicated an intensification of a legislative intent to protect the accused by providing a method of enforcement for the statutory rights the amendment created. House Bill No. 13, as amended, was passed by the House but not by the Senate.

In 1958, Senate Bill (SB) No. 38 authorized the admission of chemical test results in evidence in any criminal prosecution for a violation of any law concerning driving or attempting to drive while under the influence of intoxicating

liquor.[5] It also established certain presumptions, and it expressly protected the accused from being compelled to submit to such tests by making inadmissible evidence which violated that statutorily created right. The Legislative Council Committee on the Revision of the Motor Vehicle Laws, in its Report to the General Assembly of 1959, stated at 208:

> "It is recognized by the Committee that indiscriminate use of chemical tests may abridge the rights of innocent persons. To mitigate this fear the Committee views favorably the provision of Senate Bill No. 38 of the 1958 regular session which stipulated that the chemical tests could not be given if the suspected person would not agree to it. With this qualifying proviso, the Committee would view favorably legislation introduced to provide chemical tests." (Emphasis added.)

Thus, the Committee expressed the view that the provision that no person shall be compelled to submit to a test meant

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[5] SB No. 38, introduced 6 February 1958, 2nd reading, Judicial Proceedings Committee, 1958 Senate Journal of Proceedings, pp. 64, 70.

that the test could not be administered unless the accused affirmatively consented.

Although SB No. 38 was not enacted, in 1959, HB No. 132 was introduced to amend the Evidence Title adding "Section 100 to Article 35 of the Annotated Code of Maryland (1957 Edition). . . ." House Bill No. 132, as originally introduced, was similar to its 1958 predecessor, SB No. 38, in that it authorized the admission of the results of chemical tests in evidence in any criminal prosecution for a violation of any law concerning driving or attempting to drive while under the influence of intoxicating liquor. It established certain presumptions, and it expressly protected the accused from being compelled to submit to the test by making inadmissible evidence which violated that statutory right. In addition, HB No. 132 as originally proposed, added three additional protections for the accused by imposing three additional conditions governing the administration of the tests. Only certain qualified medical personnel were

authorized to perform the test.[6] The accused was permitted to have a physician of his own choosing perform an additional test.[7] The accused was entitled to the results of the test before trial.[8] Moreover, two amendments providing additional protections for an accused were passed. The first

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[6] Art. 35, §100(d) provided:

> "Only a physician, or qualified medical personnel, acting at the request of a police officer, or a person acting at the request of a physician, can withdraw blood for the purpose of determining the alcoholic content therein. This limitation does not apply to the taking of a breath test or a urine specimen."

[7] Art. 35, §100(e) provided:

> "The person tested shall be permitted to have a physician of his own choosing administer a chemical test in addition to the one administered at the direction of the police officer."

[8] Art. 35, §100(f), as amended, provided:

> "Upon the request of the person who was tested, the results of the test will be made available to him before trial by an official certificate which shall be admissible in evidence."

amendment provided that a specimen of blood must be taken within two hours after the accused was apprehended by an arresting officer.[9] The second amendment reinforced the exclusionary rule by making the fact that an accused refused to submit to a blood test inadmissible in evidence.[10] House

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[9] Art. 35, §100(a), as amended, provided in pertinent part:

> "In any criminal prosecution for a violation of Section 206 of Article 66 1/2 of this Code (1957 Edition, as amended from time to time) or for a violation of any other law of this State concerning a person who is under the influence of intoxicating liquor driving or attempting to drive any vehicle as specified in other laws, the amount of alcohol in the defendant's blood at the time alleged as shown by chemical analysis of the defendant's blood, urine, breath or other bodily substance, shall be admitted as evidence, provided, however, that the specimen of blood, breath, or urine must have been taken within two hours after the person being prosecuted was first apprehended by the arresting officer. . . ." (Emphasis added.)

[10] Art. 35, §100(c), as amended, provided in pertinent part:

> ". . . nor shall the fact of his refusal to so submit be admissible into evidence at his trial."

Bill No. 132 was enacted and became Art. 35, §100 of the Evidence Title, effective 1 June 1959.

The legislative history of Art. 35, §100, the predecessor of §10-302 through §10-309 of the Courts and Judicial Proceedings Article, embodied the Legislature's initial determination that certain chemical test results for alcohol were sufficiently reliable to permit their admission in evidence under certain limited conditions. Those conditions embodied statutorily created rights, deemed to be essential for the protection of the accused, and were made enforceable by an exclusionary rule, rending chemical test results inadmissible if obtained in violation of those express conditions. Of primary importance in the established statutory scheme was the express right of the accused not to be compelled to submit to a test and, as interpreted by the Legislative Council Committee, the right to have the chemical test results excluded unless the accused had affirmatively consented.

Thus, the legislative history of Art. 35, §100 establishes that while the Legislature's purpose was to protect the societal interest in successful prosecution of

drunk drivers, that purpose was not to be accomplished at the expense of rights of an accused deemed to be essential. There is nothing to indicate that the applicability of the exclusionary rule depended upon whether chemical test results used in a prosecution were administered initially for the purpose of prosecution or initially for the purpose of medical treatment. The conclusion that whenever chemical test results are used for the purpose of criminal prosecution, the exclusionary rule applies regardless of the initial purpose for which the test was administered, is further supported by an examination of the subsequent development of the statutory scheme.

In 1968, after four years of intensive study and consideration, the Committee to Study the Revision of the Motor Vehicle Laws, under the chairmanship of Hon. S. Ralph Warnken, submitted a "Proposed Revision of the Motor Vehicle Laws of the State of Maryland" to the Legislative Council of Maryland. The Committee's proposals were based upon the Uniform Vehicle Code, adopted in whole or in part by many other states. The proposed draft followed "very closely the organization of the parallel provisions of the

Uniform Vehicle Code."[11] Included among the proposed improvements was a recommendation for the adoption of an implied consent law, which would have provided, "with many safeguards," for the suspension of driving privileges of a person who refused to submit to chemical tests for alcohol.[12]

Unlike many other states, the Maryland Legislature rejected the proposed implied consent law. Instead, on 23 April 1969, it enacted Chapter 158, Art. 66 1/2, §92A, effective 1 July 1969, which required Maryland residents to consent expressly to the administration of a chemical test as

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[11] See Warnken Committee to Study the Revision of the Motor Vehicle Laws, "Proposed Revision of the Motor Vehicle Laws" (1968), p. iii.

[12] See Warnken Committee Report at p. v. The proposed text of the implied consent provision provided at p. 82:

> "Any person who operates or attempts to operate a motor vehicle upon the public highways of this State shall be deemed to have given consent . . . to a chemical test or tests of his breath or urine, for the purpose of determining the alcoholic content of his blood. . . ." (Emphasis added.)

a condition to obtaining a driver's license.[13] By requiring the

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[13] The preamble to Art. 66 1/2, §92A states that the purpose of the Act is

> "to provide as a condition to obtaining or renewing a motor vehicle driver's license, the applicant shall expressly consent to the taking of a chemical test. . . ." (Emphasis added.)

Art. 66 1/2, §92A(a) and (b) provided in pertinent part:

> "(a) Prior to the issuance of any license or renewal thereof to exercise the privilege of operating a motor vehicle upon the highways of this State, the applicant, as a condition precedent to the issuance or renewal of said license, shall be required by the Department to sign a statement, under oath or affirmation, containing the following language:
>
> "I hereby consent to take a chemical test to determine the alcoholic content of my blood, breath, or urine. . . ."
>
> "(b) In return for the privilege of operating a motor vehicle on the highways of this State given to a nonresident under this Article, any nonresident who operates or attempts to operate a motor vehicle upon the highways of this State, shall be deemed to have given consent to take a chemical

Cont'd.

express consent of an accused before administering a chemical test, the Maryland Legislature reiterated its intent

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test for alcohol." (Emphasis added.)

The successor to Art. 66 1/2, §92A, Md. Code (1977, 1980 Cum. Supp.) §16-205.1 of the Transportation Article, effective 1 July 1977, was amended, by Chapter 244 of the 1981 Laws of Maryland, effective 1 July 1981, and therefore, not applicable here, to provide an implied consent provision applicable to Maryland residents. That Chapter states in pertinent part:

> "(a) Any person who drives or attempts to drive a motor vehicle on a highway or on any private property that is used by the public in general in this State is deemed to have consented, subject to the provisions of §§10-302 through 10-309, inclusive, of the Courts and Judicial Proceedings Article, to take a chemical test to determine the alcohol content of his blood if he should be detained on suspicion of driving or attempting to drive while intoxicated or while under the influence of alcohol."
>
> "(b) A person may not be compelled to take a chemical test for alcohol. . . ."

and purpose to protect rights of an accused deemed to be essential.[14]

On the same day the Legislature enacted Art. 66 1/2, §92A, it also repealed and reenacted Art. 35, §100. Subsection (c) was amended to provide an additional protection to an accused by establishing the right to select the type of test to be administered.[15] More important, Art.

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[14] In light of the Maryland Legislature's rejection of the implied consent provisions contained in the Uniform Motor Vehicle Code, cases from jurisdictions other than Maryland, relied upon by the majority, are not persuasive.

[15] Art. 35, §100(c), as amended, provided in pertinent part:

> "In any event, the defendant shall have the right to select the type of test administered, and if facilities or equipment are not available for such test then none shall be given, and this fact shall not create any inference or presumption concerning either his guilt or innocence by reason of his inability to take a test, nor shall the fact of his inability to take such a test be admissible in evidence at his trial, nor shall this fact be considered a refusal to take a test under Section 92A of this Article."

Chapter 240 of the 1981 Laws of Maryland, effective 1 July 1981, not here applicable, amended §10-305 of the Courts and Judicial Proceedings Article, the successor to Art. Cont'd.

35, §100(g), which then provided that an officer advise an accused that he "may, but need not" submit to a chemical test, and had been interpreted by this Court in dicta in Mauldin v. State, 239 Md. 592, 595, 212 A.2d 502, 504 (1965), as not requiring that an accused affirmatively consent to a test, was deleted from the Evidence Title. A requirement that an officer request that the person take a chemical test and file a report if that person refused, was enacted in Art. 66 1/2, §92A of the Motor Vehicles Title.[16] By creating an

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35, §100(c), to provide that under certain circumstances a police officer, rather than an accused, may select the type of test to be administered and that persons incapable of refusing to take a test shall be deemed not to have withdrawn consent. More specifically, §10-305(c) provides:

> "Any person who is dead, unconscious, or otherwise in a condition rendering him incapable of test refusal shall be deemed not to have withdrawn consent."

[16] Art. 66 1/2, §92A(c) provided in pertinent part:

> "(c) It shall be the duty of any police officer who stops or detains any person who he has reasnable grounds to believe is or has been operating or attempting to operate a motor vehicle under the influence of alcohol, or who is or has been operating or attempting to operate a motor vehicle while his ability

Cont'd.

additional statutory right and by explicitly providing that affirmative consent of the accused be obtained, the Legislature once again reiterated its determination to protect the rights of the accused.

In 1973, Art. 35, §100 was revised and reenacted as §10-302 through §10-309 of the Courts and Judicial Proceedings Article. The Revisor's Notes accompanying §10-302 through §10-309 indicate that those sections contained new language derived from Art. 35, §100 and that the changes made were changes in style and language. While the Revisor's Notes are not law and may not be considered to have been enacted as part of the Act, ch. 2, §19, 1973 Laws of Md.Spec.Sess., they are entitled to weight. See Rentals Unlimited, Inc. v. Administrator, Motor Vehicle Admin., 286

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was impaired by the consumption of alcohol to do all the following things:

"2. Request that he take a chemical test or tests of his blood. . . .

"4. File with the Department of Motor Vehicles . . . a sworn report . . . that said person refused to take the chemical test for alcohol. . . ." (Emphasis added.)

Md. 104, 109, 405 A.2d 744, 748 (1979). These Notes establish that the language revisions in §10-302 through §10-309 were not intended to produce substantive changes in the law or its purpose.

Only one other relevant change occurred when, in 1977, Art. 66 1/2, §6-205.1, the successor to Art. 66 1/2, §92A, was revised and reenacted as §16-205.1 of the Transportation Article. While Art. 66 1/2, §6-205.1(c)(2) required that officers request persons to submit to chemical tests, §16-205.1(c)(2) requires that officers request such persons to <u>permit</u> chemical tests to be administered. The Revisor's Note accompanying §16-205.1 establishes that this language change is one of style, thus clarifying the previous language and establishing that the affirmative consent of an accused is required before a chemical test is administered by or at the direction of a police officer.

The Legislature's initial determination to protect the rights of an accused by requiring that an accused not be compelled to submit to a chemical test, its adoption of an exclusionary rule to enforce that right, its subsequent repeated determinations to provide additional protections for

an accused, its rejection of an implied consent statute and its adoption of an express consent statute, its requirement that an accused affirmatively consent to a test administered by or at the direction of a police officer, and the Leglislative Council Committee's repeated statements that there be no "involuntary taking of a person's blood" and that chemical tests could not be administered if an accused "would not agree to it," all lead to a single conclusion. In my view, this history establishes a legislative purpose to protect the rights of an accused, particularly the right not to be compelled to submit to a test, whenever chemical test results are ultimately used for the purpose of criminal prosecution.

Sections 10-302 through 10-309 expressly state that chemical test results are admissible in evidence under certain limited conditions in any criminal prosecution for a violation of any state law concerning a person accused of driving while intoxicated. More specifically, the exclusionary rule contained in §10-309 expressly states that such test results are inadmissible in such prosecutions if obtained contrary to the requirements set forth in the subtitle. In my view, the plain and unambiguous language of the statute establishes

that the exclusionary rule applies whenever test results are utlimately used for the purpose of criminal prosecution. Such an interpretation is manifestly consonant with the Legislature's broad purpose.

Moreover, there is no express language in §10-302 through §10-309 that states that the exclusionary rule does not apply when results of a chemical test, administered by or at the direction of a physician initially for the purpose of medical treatment are subsequently used for the purpose of prosecution. In addition, there is nothing in the legislative history to indicate a legislative intent to make the applicability of the exclusionary rule dependent upon whether chemical test results used in a prosecution were administered initially for the purpose of prosecution or initially for the purpose of medical treatment. I cannot, as does the majority, insert words creating an exception to the applicability of the exclusionary rule that makes the statute express an intention different from its clear meaning. See Holy Cross Hosp. of Silver Spring, Inc. v. Maryland Employment Sec. Admin., 288 Md. 685, 698, 421 A.2d 944, 950 (1980); In re: James S., 286 Md. 702, 705, 410 A.2d 586, 591 (1980).

The majority's reliance on the case of Lilly v. State, 212 Md. 436, 129 A.2d 839 (1956), to support its conclusion that chemical test results administered for the purpose of medical treatment are admissible in evidence, is misplaced. In Lilly, a case involving a prosecution for a violation of the predecessor to Md. Code (1957, 1976 Repl. Vol.), Art. 27, §388, the State was not contending that the accused was operating a motor vehicle under the influence of liquor. Nevertheless, the results of a chemical test were admitted in evidence. The facts show, however, that the chemical test was administered at the direction of a police officer after he had obtained the affirmative consent of the accused. Under these circumstances, Lilly can lend no support to the majority's conclusion that the results of chemical tests administered at the direction of a physician for the purpose of medical treatment are admissible in evidence. Rather, in my view, the plain language of the statute, the Legislature's broad purpose, and its insistence on protecting the rights of an accused lead to the conclusion that whenever chemical test results are used for the purpose of criminal prosecution, the exclusionary rule applies regardless of the initial purpose

for which the test was administered.

The remaining question this case presents is whether §10-309 is violated when an accused does not affirmatively consent to a chemical test, administered by or at the direction of a physician, initially for the purpose of medical treatment.

Section 10-309 of the Courts and Judicial Proceedings Article provides in pertinent part:

> "A person may not be compelled to submit to a chemical analysis provided for in this subtitle. Evidence of chemical analysis is not admissible if obtained contrary to its provisions."

The plain language of this section establishes that chemical test results are inadmissible in a prosecution if the accused is compelled to submit to the test.

In State v. Loscomb, 291 Md. 424, 435, 435 A.2d 764, 770 (1981), this Court unanimously agreed[17] that §16-205.1 of the Transportation Article and §10-302 through §10-309 of the Courts and Judicial Proceedings Article are in pari materia and must be construed harmoniously. Therefore,

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[17] Eldridge, J., did not participate.

§16-205.1 is significant in determining the meaning of the word "compelled." Section 16-205.1 provides in pertinent part:

> "(c) . . . If a police officer stops or detains any individual who the police officer has reasonable grounds to believe is or has been driving or attempting to drive a motor vehicle while intoxicated or while his driving ability is impaired by the consumption of alcohol, the police officer shall:
>
> "(2) Request that the individual permit a chemical test to be taken of his blood. . . ." (Emphasis added.)

In Loscomb, we determined that when a chemical test is administered by or at the direction of a police officer initially for the purpose of prosecution, the affirmative consent of an accused must be obtained and that the exclusionary rule of §10-309 applies when there has been a failure to obtain such affirmative consent. This conclusion was based upon the rationale that under such circumstances the accused was compelled to submit to the test.

I recognize that there is no express statutory provision requiring affirmative consent when a chemical test is administered by or at the direction of a physician for the

initial purpose of medical treatment. However, the Legislature's initial determination to protect the rights of an accused by requiring that an accused not be compelled to submit to a chemical test, its adoption of an exclusionary rule to enforce that right, its rejection of an implied consent statute and its adoption of an express consent statute, its requirement that an accused affirmatively consent to a test administered by or at the direction of a police officer, and the Legislative Council Committee's repeated statements that there be no "involuntary taking of a person's blood," and that chemical tests could not be administered if an accused "would not agree to it," all lead to a single conclusion. In my view, this history establishes a legislative purpose to protect the rights of an accused by requiring affirmative consent to a chemical test whenever chemical test results are ultimately used for the purpose of criminal prosecution. I cannot conclude, as does the majority, that the Legislature intended the definition of the word "compelled" to include a person who has not given affirmative consent to a chemical test administered by or at the direction of a police officer initially for the purpose of prosecution, but not to include a

person who has not given affirmative consent to such a test administered by or at the direction of a physician initially for the purpose of medical treatment. In the final analysis, a person who has not affirmatively consented to the administration of a chemical test is equally compelled to submit to that test whether administered by a physician for the initial purpose of medical treatment or administered by a police officer for the initial purpose of prosecution. In addition, such a person is equally prejudiced when such chemical test results are admitted in evidence, whether the test was administered for the initial purpose of medical treatment or for the initial purpose of prosecution.

In view of the plain language of the statute, the Legislature's broad purpose and its insistence on protecting the rights of an accused, I would hold that the exclusionary rule applies to and prohibits the admission in evidence of chemical test results administered by a physician initially for the purpose of medical treatment without the affirmative consent of the accused.

Here the record shows that the chemical test results admitted in evidence were administered at the direction of a

physician for the purpose of medical treatment without obtaining the affirmative consent of the accused. Under these circumstances, the accused was compelled to submit to the chemical test in violation of §10-309. Moreover, the record shows that the accused did not have the right to select the type of test administered as required by §10-305. In my view, the exclusionary rule contained in §10-309 prohibited the admission of such evidence. The trial court committed prejudicial error when it admitted the chemical test results. Given the majority's view expressed in Loscomb, that the exclusionary rule contained in §10-309 is applicable in prosecutions for violations of Art. 27, §388 as well as in prosecutions for violations of Md. Code (1977) §21-902 of the Transportation Article, effective 1 July 1977, I would affirm the judgment of the Court of Special Appeals, reversing the trial court's judgment.

Judge Eldridge authorizes me to say that he concurs in the views herein expressed.

CRAIG WESLEY MOON	*	IN THE
Appellant	*	COURT OF
v.	*	SPECIAL APPEALS
STATE OF MARYLAND	*	OF MARYLAND
Appellee	*	Sept. Term, 1980
	*	No. 154
	*	October 30, 1980

* * * * * * *

OPINION

Gilbert, C.J., Morton, Moore, JJ.

In a non-jury trial in the Circuit Court for Carroll County, the appellant was convicted on two counts of manslaughter by automobile (Md. Ann. Code, art. 27, §388) and one count of driving while intoxicated (Md. Transp. Ann. Code, §21-902). He was given concurrent three year sentences on the manslaugher convictions and a one year concurrent sentence on the driving while intoxicated conviction.

The record indicates that in the early morning hours of February 18, 1979, the appellant was driving his car north on the road leading from Westminster, Maryland, to the Pennsylvania line when he collided with a car being driven

south on that same road. As a result of the accident the driver and passenger in the southbound car were killed.

There was evidence produced by the State that the accident occurred in the southbound lane and was caused by the appellant's vehicle being driven across the center line into the southbound lane. The appellant produced evidence that the frontal collision occurred just over the center line in the northbound lane.

There was testimony from the driver of a car which had been following appellant's car at some distance. Although he did not see the accident take place, he arrived immediately afterward. He found appellant wedged into the driver's seat of his car. He was unable to open the doors of appellant's car and detected a strong odor of alcohol.

According to State Trooper Jack L. Hinkle, he arrived at the accident scene at 12:34 a.m., some thirty to forty-five seconds after it occurred. He went to appellant's wrecked car and realized he could not move appellant because he was trapped behind the steering wheel. It was necessary to cut the roof off the car to release him. The trooper noticed the odor of alcohol emanating from appellant's car.

After appellant was extricated from his car he was placed aboard a State police helicopter which took him to the Shock Trauma Unit of the University Hospital. The hospital toxology report indicated that a blood test was administered to appellant at 2:49 a.m. The specimen indicated that appellant's blood contained .165 of methyl alcohol (drinking alcohol).

Appellant first contends that the blood test should have been excluded because the blood sample was not extracted within two hours after the appellant was taken by the police from the scene of the accident.

Md. Cts. & Jud. Proc. Ann. Code §10-302 provides:

> "In a prosecution for a violation of a law concerning a person who is driving or attempting to drive a vehicle in violation of §21-902 of the Transportation Article, a chemical test of his breath or blood may be administered to the person for the purpose of determining the alcohol content of his blood."

Section 10-303 of the Cts. & Jud. Proc. article provides:

> "The specimen of breath or blood shall be taken within two hours after the person accused is apprehended."

Section 10-307(e) of Cts. & Jud. Proc. article provides:

> "If there was in his blood at the time of testing 0.15 percent, or more, by weight, of alcohol, as determined by an analysis of his blood or breath, it shall be prima facie evidence that the defendant was intoxicated."

The appellant was found guilty on two counts of violating Md. Ann. Code, art. 27, §388, manslaughter by automobile, motorboat, etc., as distinguished from conviction under art. 27, §388A, homicide by motor vehicle while intoxicated. This Court held in Loscomb v. State, 45 Md. App. 598, 612-13 (1980),[1] "that the blood-breath test that is articulated in Courts Art. §10-307, along with Transportation Art. §16-205.1(c) is as much a part of Article 27, §388 as it is Article 27, §388A, if and when the basis of the charge under section 388 is that the accused was intoxicated. We hold, therefore, that whenever a person is charged under Md. Ann. Code art. 27, §388 (Manslaughter by motor vehicle), and the basis of the charge is the alleged intoxication of the accused while operating a motor vehicle, no evidence derived from

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[1] The Court of Appeals granted certiorari and the case has been assigned No. 38, September Term, 1980.

any chemical analysis administered or caused to be administered by the police, is admissible in evidence unless there has been compliance with Courts Art. §10-305. The burden, of course, is on the State to satisfy the court that compliance has occurred."

Here there can be no question that the appellant's alleged intoxication formed a substantial basis of the charge of manslaughter by automobile for the trial judge so found in the course of articulating his reasons for finding appellant guilty of that offense. Moreover, he went on to find him guilty of the separate charge of driving while intoxicated in violation of Transportation article, §21-902.

Chief Judge Gilbert, who authored Loscomb, set forth the steps to be followed by the police:

> "To avoid future difficulty surrounding either a blood or breath test, irrespective of whether the charge be laid under Article 27, §388 or 388A, or under the Transportation Article, the better practice for the detaining officer to follow is:
>
> 1) request the person to submit to a chemical test to determine the alcoholic content of that person's blood;

2) if the person is a licensed Maryland operator, furnish a copy of the consent form that is required of all Maryland licensed operators;
3) inform the person of his or her right to elect whether to submit to a breath test or a blood test or to refuse to submit to either;
4) advise the person that if he or she elects to submit to a chemical test that he or she has the privilege of choosing a physician to administer the test, but the physician is in addition to the physician designated by the officer;
5) inform the person detained that if he or she refuses to submit to a chemical test, no inference or presumption concerning guilt or innocence arises because of the refusal;
6) apprise the person that the results of a chemical test give rise to the presumptions specified in Courts Art. §10-307;
7) advise the person that he or she is subject to <u>administrative</u> penalties for failure to submit to the test." 45 Md. App. 612.

Not one of these steps was followed by the police. Moreover, there was evidence that the blood test was not

administered to the appellant within the two hour time limitation imposed by Cts. & Jud. Pro. art. §10-303. See Major v. State, 31 Md. App. 590 (1976), cert. denied, 278 Md. 722.

The State argues that §10-303 has no application to the present case because the appellant was not an "accused" who had been "apprehended" at the time the blood test was taken and he was not charged until some ten days later. We think the State reads the statute too narrowly. The police had reason to believe that the appellant had been drinking because of the odor of alcohol emitting from him at the scene of the accident and during the helicopter trip to the hospital. They knew that one of the occupants of the other car was dead at the scene of the accident and the other had sustained critical injuries.

It is certainly understandable that because of the serious injuries which appellant had received at the accident the police found it inappropriate, if not impossible, to follow the steps outlined in Loscomb. The fact remains, however, that the steps were not pursued. In our opinion, this failure to follow the mandates of the statutes relating to tests for

alcohol content of appellant's blood made inadmissible the toxology report containing the notation that appellant's blood contained .165 percent alcohol. Likewise it made inadmissible the testimony of Dr. Yale H. Caplan, Chief Toxologist of the Medical Examiner's Office, with respect to the meaning of the figure .165 set forth in the toxology report. It also precluded the judge from employing the presumption as to intoxication set forth in Cts. & Jud. Proc. art., §10-307.

We are not persuaded, as the State argues in its brief, that if this Court's holding "that the trial court's reference to §10-307 was error, such error should be considered harmless in view of the exhaustive expert testimony on the significance of Appellant's blood alcohol level of .165 percent."

In view of our holding, we do not reach the appellant's remaining contentions.

JUDGMENTS REVERSED;

CASE REMANDED FOR A NEW TRIAL;

COSTS NOT REALLOCATED AS PART OF THE JUDGMENTS OF THIS COURT PURSUANT TO MARYLAND RULE 1082f.